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No. 03-

IN THE

Supreme Court of the United States

VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS, and ALEXANDER C. PIRNIE,
Petitioners,

v.

ELECTRICAL INSPECTORS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD T. RAVE, JR.
LAW OFFICES OF
DONALD T. RAVE
11 The Plaza
Locust Valley, NY 11560
(516) 671-1295

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street
8th Floor
New York, NY 10013
(212) 334-8813

FRANK AMBROSINO
REILLY, LIKE, TENETY
& AMBROSINO
179 East Neck Road
Babylon, NY 11704
(631) 669-3000

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Attorneys for Petitioners

136 pp

QUESTIONS PRESENTED

This case arises from a local government's designation of a non-for-profit, nongovernmental corporation to be the exclusive provider of electrical inspections within village limits. The following questions are presented for the Court's review:

1. Whether the antitrust immunity that attaches when the adverse effect *on competition* of an exclusive designation is held authorized under State law, *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), is overcome by a would-be competitor's allegations that the designee is "abusing the monopoly," by providing local residents "low quality service"?

2. Whether "heavily factual" federal court scrutiny of local government supervision of the designee's performance is compatible with the federalism principles on which state action immunity is grounded?

3. Whether a local government whose only challenged conduct has been judicially determined to satisfy the prerequisites for immunity established in *Hallie* may nonetheless be required to defend its supervision of its designee's performance in a Sherman Act suit?

PARTIES TO THE PROCEEDING BELOW

Petitioners Islandia, New York Board of Fire Underwriters, and Alexander C. Pirnie were appellees in the court below. Respondent Electrical Inspectors, Inc. was appellant.

The Villages of Roslyn, Oyster Bay Cove, Island Park, Brookville, North Hills, Flower Hill, Great Neck, Great Neck Estates, Kings Point, Port Washington North, Sea Cliff, Saddle Rock and Baiting Hollow, though named in the original caption of the court of appeals, did not participate in those proceedings, nor are they petitioners here.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The New York Board of Fire Underwriters is a legislatively-chartered not-for-profit "body, corporate and politic." It has no parent corporation nor stockholders.

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OPINIONS BELOW

The decision of the Second Circuit panel, as amended, is reported at 320 F.3d 110, and is reprinted in the appendix ("App.") at 1a. The district court opinion, reported at 145 F. Supp. 2d 371, is reprinted in the appendix, beginning at 31a. The original opinion, which has been withdrawn, is reprinted beginning at 43a. The orders denying rehearing and rehearing en banc may be found at 72a.

JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment denying on rehearing on March 18, 2003. Justice Ginsburg entered an order extending the time to file to July 31, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1, 2

N.Y. EXEC. L. 370 *et seq.*

19 C.R.R. § 429 (1981)

The text of these are set out in full in the appendix.

Statement of The Case

This case presents important questions about the antitrust protection for governmental acts recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985). It arises from an action taken by a local government, pursuant to State law and in furtherance of core public safety responsibilities: a resolution passed by Petitioner, the Village of Islandia, New York, designating a quasi-public, not-for-profit, fire safety body, the New York Board of Fire Underwriters (the "Board" or "New York Board," also a Petitioner), as the sole provider of officially-recognized electrical inspections within Village boundaries.[1]

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[1]Petitioner Alexander C. Pirnie was President of the New York Board, when suit was filed, but has since retired. *See* App.5a n.3 (noting that court's "legal conclusions regarding the Board apply equally to Pirnie").

Although recognizing that single-source provision – and restriction of competition it entails – were a plainly foreseeable result of New York laws vesting the State's local governments with responsibility for fire code inspections, the Second Circuit held that the district court erred in dismissing, on immunity grounds, antitrust claims of a for-profit inspector excluded from the "Islandia market," Respondent Electrical Inspectors, Inc. ("EII"). Citing EII's allegations that the New York Board was "abusing" the (lawful) "monopoly" conferred by the resolution, *e.g.*, by providing "low quality service," the appeals court held that immunity would require a further showing: that Islandia's supervision of the Board was sufficiently "active," *see California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The court then ruled that the immunity – and potential liability – of *the Village* should depend on the outcome of the inquiry into its "supervision." While declining to decide what relief, if any, could ultimately be entered against Islandia, the Second Circuit decision described the federalism concerns that would ordinarily weigh against federal court intervention as less "pressing" here, because the defendant is a local government, rather than a State, and because only injunctive relief is sought.

As we explain herein, this re-framing of state action immunity will have significant, immediate effects not only on a wide range of litigated disputes, but on the basic policy decisions of State and local governments.

Factual Background

1. Islandia is an incorporated village of some 3,000 inhabitants, located in Suffolk County, on New York's Long Island. In August 1988, the Village Trustees enacted a resolution – which has been renewed annually, since – designating the New York Board of Fire Underwriters as Islandia's "electrical inspection agency."

2. The Board is a legislatively-chartered not-for-profit

"body, corporate and politic," 1930 N.Y. L. Ch. 241; *see also* 1867 N.Y. L. Ch. 846, whose members include some 96 companies authorized to write fire insurance policies within the State. Consistent with its fire prevention mission – and with the special fire danger that faulty electrical installation threatens – the Board, for more than a century, has provided electrical inspection service to the public. Its inspections are conducted by a staff of salaried professionals, whose independence is reinforced by Board rules which prohibit them from performing electrical contracting work.[2]

3. Islandia's resolution was prompted by a 1981 New York statute providing for a uniform, locally enforced, Building and Fire Code, *see* N.Y. L. 1981 ch. 707, N.Y. EXEC. L. § 370 *et seq.* – and by implementing regulations requiring local governments to condition issuance of certificates of occupancy on applicants' obtaining qualifying electrical inspections. 19 N.Y.C.R.R. § 429.2(b), (c).[3]

4. Islandia's approach to its fire prevention responsibilities is not uncommon. A substantial number of New York municipalities (roughly 250 out of 1000) rely on the New York Board exclusively for electrical inspection services. Other local governments contract with or otherwise exclusively designate a *different* agency; others – mostly

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[2]The Board's electrical inspection practice was initiated in 1881, at the invitation of Thomas A. Edison. The Board's other major activity is operating the New York City Fire Patrol, whose members have special expertise in recovering property from burning and fire-damaged structures.

[3]In enacting the Uniform Fire Prevention and Building Code Act, the State Legislature declared, *inter alia,* that "it shall be the public policy of the state of New York" to "[p]rovide for the promulgation of a uniform code addressing building construction and fire prevention,* * * in full force and effect in every area of the state"; [and] "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." *Id.* N.Y. EXEC. L. § 371(2). The Act prescribed standards for drafting the code and directed New York's Secretary of State to "promulgate rules and regulations prescribing minimum standards for [its] administration and enforcement." *Id.* § 381.

larger cities and towns – have salaried municipal employees perform inspections; and still others issue certificates of occupancy based on inspections performed by Respondent and/or other for-profit providers. *See* Ct. App. J.A.456 (Affidavit of Alexander Pirnie ¶¶12-13). Regulations in effect when Islandia designated the New York Board recognized that:

> the local legislative body of a city, town, or village may by resolution, provide that such inspections be performed by the following: "a designated officer or employee of the city, town or village"; "a designated officer or employee of another city, town, or village who is qualified to conduct such inspections"; "a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village"; "an employee or agent of the county who is qualified to conduct such inspections"; or "a competent inspector, designated or approved by the city, town or village, whose fee shall be paid by the person * * * to which the building permit was issued."

App. 33a (quoting 19 N.Y. C.R.R. § 429.2(b)(2)(I)-(v)).[4]

5. In a district court affidavit, Frank Falco, Islandia's mayor and a member of the Board of Trustees at the time of the 1988 resolution, explained that the original designation decision was based on the Board's reputation and long experience, the reasonableness of its fee schedule, and the expense that the alterative – hiring a Village employee comparably qualified to perform inspections – would entail. The Mayor further attested that, between 1988 and 1995, he knew of no other inspection provider active in the area, and that the decisions, in more recent years, to continue the Board's status as exclusive provider reflected satisfaction with the quality of its performance; the increased expense the Village would incur in monitoring the work of multiple, competing inspectors; and concern that unbridled

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[4]These regulations were withdrawn in 1996. *See* n.9 *infra*.

competition could undermine public safety. *See* Ct. App. J.A. 607.[5]

District Court Proceedings

1. In 1999, EII filed this federal antitrust suit against the New York Board, the Village, and other Long Island villages (no longer parties to the case) which had designated the Board as the lone, officially-recognized electrical inspection provider.[6] The complaint alleged, among other things, that Islandia's resolution conferred a "de facto monopoly"; that the Board's service suffers as a result (*e.g.*, inspections are too cursory or not preformed promptly on request); and that Islandia does not sufficiently "supervise" the Board – *e.g.*, by adopting regulations that provide Islandia residents with "recourse [for] * * * poor service [or] * * * unfair charges," or by imposing fixed time limits within which the requested inspections must be completed. EII further asserted that the Board's involvement in drafting Islandia's resolution was inappropriate; that Board employees have unfairly disparaged EII's work to consumers, electricians, and government officials; and that the Board's actions had caused EII needless expense in those jurisdictions

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[5]The Village's modest size – it is home to an estimated 1,000 families, only a fraction of whom undertake construction and/or electrical projects in a given year – means that Mayor Falco personally signs certificates of occupancy, each one of which is prepared by a single individual, the Town's Building Inspector, whose responsibilities include not only reviewing the electrical inspection report, but also physically inspecting the same construction sites that the electrical inspector does. A single New York Board inspector performs all of the Islandia work.

[6]EII's complaint included, in addition to its claims under § 1 and 2 of the Sherman Act, claims under State statutory and common law and the State and Federal Constitutions, but none of these other causes of action remains in the case. EII's other federal claims were dismissed voluntarily (with prejudice), and the court dismissed its State law claims, without prejudice to their being re-filed in State court.

Rather than face the burden of litigating, all of the governmental defendants other than Islandia entered into settlement agreements with EII, acceding to its demand that its inspections would be considered in granting certificates of occupancy.

where it ultimately obtained the opportunity to compete. The complaint also included allegations that, in places where the Board was the exclusive provider, it was abusing that position, by "threatening [to] retaliate" against customers (or electricians) in those jurisdictions if they gave EII business elsewhere. *See* Ct. App. J.A. 36-78.[7]

2. Notably, although the complaint included a paragraph alleging that the Board has "unbridled power to control prices charged to consumers * * * in all municipalities where competition has not been authorized," *id.* 64 (Compl. ¶118), it is undisputed that the Board's rates are the same in jurisdictions where it is the sole provider and those where competition is open. *See* 35a (noting that "EII does not dispute that the Board charges a uniform rate [throughout the State] and that the fee schedule is disseminated throughout Nassau and Suffolk Counties"). Indeed, the most specific complaint about the level of the Board's rates came in the affidavit of EII's president, who asserted that the Board's rates are unfairly *low*, subsidized by the contributions of its insurance company members. *See* Ct. App. J.A. 650 (affidavit of Richard M. Bivone).

The District Court Decision

Although Islandia and the Board denied (and later,

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[7]Although they figured prominently in the appellate opinion, these last allegations were, from the outset, couched in tentative and highly general terms. Thus, the Board was accused of "question[ing]" electricians who considered retaining EII on inspections in other jurisdictions and "explicitly or implicitly suggest[ing] that retaliatory or harassing measures" would be taken, and was alleged to be in a "unique position to retaliate * * * against electricians." Ct. App. J.A.52.

More important, Petitioners' summary judgment motions homed in on the absence of any *evidence* of retaliation or even threatened retaliation – let alone any incident that had occurred in Islandia – and the absence of even an *allegation* of an effect on *competition* cognizable under the Sherman Act. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). At oral argument on summary judgment, the district court pointedly pressed Respondent to identify specific evidence that would substantiate its "broad, general" allegations, but EII could not cite any. (Mar. 23, 2001) Tr. 19-21.

through affidavits, refuted) the complaint's central factual allegations, and sought summary judgment on several distinct grounds, the district court issued an opinion addressing the state action immunity issue only, holding both the Village and the New York Board entitled to summary judgment on that basis. *See* App. 31a.[8]

1. Judge Wexler began by noting that, under this Court's case law, antitrust immunity for local government action is derivative in character, *i.e.*, a consequence (1) of the rule that the governmental acts of *States* are categorically beyond the reach of the antitrust laws, *Parker*, and (2) of recognition that States frequently implement their policies through local governments and subdivisions, *see City of Lafayette v. Louisiana Power & Light,* 435 U.S. 389, 416 (1978) (plurality opinion). Thus, when municipal action is challenged, the immunity analysis focuses on whether the action is pursuant to State authorization and whether the State policy contemplated the objected-to effect on competition. *Id.* (citing *Town of Hallie*, 471 U.S. at 40).

2. After reviewing the pertinent New York statutes and regulations, the district court concluded that the "'legislature contemplated the action complained of'" in this case, 38a (quoting *Cine 42nd Street Theater Corp. v. The Nederlander Org., Inc.*, 790 F.2d 1032, 1042 (2d Cir. 1986), and *Hallie,* 471 U.S. at 44), *i.e.*, it was "foreseeable that a municipality would, though it need not, displace competition in administering and enforcing its own electrical inspection program within its limited geographic area by appointing an exclusive agent."

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[8]After Respondent moved, under Fed. R. Civ. P. 12(f), to strike the immunity defense, Petitioners cross-moved for summary judgment on that ground, and both parties submitted affidavits. Petitioners also sought summary judgment based on the substantive deficiencies in EII's antitrust claims and because any conduct by the Board seeking government action was entitled to "*Noerr-Pennington*" immunity. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991) (describing *Noerr* as a "corollary" of *Parker* immunity). Its state action ruling, the district court ruled, obviated the need to pass upon the *Noerr-Pennington* issue. *See* App. 42a. n.3.

App. 39a. In reaching that conclusion, the district court emphasized that the New York Legislature expected its fire prevention policy to be accomplished through local government enforcement; that the responsibilities conferred were limited as to both geography and subject matter; and that they involved matters "integral to public health and safety" concerns at the core of traditional local police powers. *Id.*

3. Judge Wexler then rejected EII's contention that immunity should depend on whether or not Islandia's supervision of the Board was "active." Proof of "supervision" is necessary, he explained, when the "*effective decision*" challenged is that of a private party. Here, by contrast, the actions:

> allege[d to] cause[] injury to EII are the municipal defendants' appointments of the Board as exclusive agent, not the alleged unsupervised Board conduct or alleged unsupervised Board fee-setting.

App. 40a.

4. The *Board's* entitlement to immunity, the district court then held, followed as a matter of law. Since "the municipal defendants[']decisions *appointing* the Board as exclusive agent" could not be the basis for antitrust liability, Judge Wexler explained, *see* App. 41a (emphasis supplied) the Board, "as the party receiving those appointments" must be "similarly immune," *id.* A different rule would open the door to "tangential attack[s]" on decisions like Islandia's, *id.*

The Second Circuit Decision

On appeal, the Second Circuit held that the judgment of dismissal could not stand. The appeals court agreed with the district court (1) that New York Law confers the necessary "authority to regulate," and (2) that "suppression of competition" was "foreseeable" – *i.e.*, that the requirements of the *Hallie* test were met – but it found error in Judge Wexler's holding that the immunity analysis did not require

inquiry into "active supervision."[9]

1. By focusing on the lawfulness of Islandia's resolution, Judge Sack reasoned, the district court did not take account of EII's claims that *the Board* was "violat[ing] the Sherman Act by willfully seeking and maintaining monopolies * * * and by abusing its monopoly power by providing low-quality service and by attempting to expand its overall market share by threatening retaliatory action against those persons who use the plaintiff's service where competition is allowed." Because these allegations concerned "transactions [between the Board and] other private parties," the *Midcal* test, rather than the *Hallie* standard, should govern.[10]

2. The court of appeals then distinguished two recent Circuit precedents, *Cine* and *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59 (2d Cir. 1998),

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[9]The appeals court offered a "common sense" explanation for its conclusion that EII's exclusion was "a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations that condition the issuance of certificates of occupancy upon inspections by town-designated agents":

> Municipalities often use their own employees to enforce a variety of public codes, such as food preparation or building codes, thereby effectively conferring upon *themselves* exclusivity in the market for required inspection services at a cost to private entities that would perform the same services.

App. 15a. Rejecting EII's suggestion that public, but not private, monopoly was foreseeable, the decision continued: "Whom the municipality selected as the party exercising exclusivity is at best tangential to the inquiry into the foreseeability of suppression of competition * * * * the degree of suppression is the same." *Id.*

In holding that the Islandia's resolution fell "within the broad grant of state authority," conferred under the Fire Prevention Code, the opinion, citing the "concept of authority that principles of federalism compel [federal courts] to apply" in the state action immunity setting, rejected EII's argument that the withdrawal of the interpretive regulations supportive of the Board's position should foreclose immunity. App. 14a.

[10]While recognizing that the Board's actions in "pursuit of" Islandia monopoly might be entitled to *Noerr-Pennington* immunity, the appeals court left the issue for the district court to decide.

which had accorded private defendants immunity without any inquiry into "supervision." In those cases, the appeals court explained, "the only anticompetitive actions allegedly taken by the private-party defendants were those of contracting with the state-created entity," App. 23a. In such instances, the "authorization of the government's contracting" necessarily entails "authorization of the private parties' contracting," and the concerns the supervision requirement is "designed to address" necessarily are satisfied. App. 24a.

3. The appeals court then took up the implications of its analysis for the disposition of this case. After noting that the "active supervision" question was "heavily factual," *id.* at 26a – and could not be resolved one way or another on appeal – the court expressed doubt that the assertion of immunity for behavior allegedly "pursuant to" the monopoly would succeed, suggesting that Islandia's power to replace the Board (or invite competition from EII) was akin to the "negative option" review of collectively set rates rejected as inadequate in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992).

4. The court then held that the *Village's* fate should also await the outcome of the "active supervision" inquiry. While recognizing that no decision of this Court has "held that a state's failure to supervise a regulated private party can deprive the state of immunity under *Parker*, even though such a failure can result in liability for the private party," 28a-29a, the Second Circuit declined to dismiss the claims against Islandia. Explaining that there was no need, in advance of a liability determination, to resolve whether injunctive relief against the Village was legally authorized, the decision indicated that such relief would not raise especially "pressing" "federalism-based concerns," *id.* – both because "the Village is not a sovereign" and because EII was "only" seeking injunctive and declaratory relief against Islandia, *id.*

REASONS FOR GRANTING THE WRIT

By holding that *Parker* immunity depends on local

government supervision of the *service* rendered "pursuant to" a State-authorized exclusive designation, the Second Circuit has decided a frequently recurring question of federal law in a manner that requires this Court's review.

The free-floating governmental "supervision" obligation imposed in this case bears scant relation to the narrow, but important, purpose the "active supervision" requirement has served in this Court's immunity case law, *i.e.*, providing further assurance that private *anti-competitive conduct* is, as claimed, authorized by the State. The "low quality service" exception will swiftly "swallow" what the overwhelming majority of Courts of Appeals have – correctly – held to be the rule: that exclusive designations by local governments should be tested under the *Hallie* standard, which focuses on whether *the effect on competition* is State-authorized.

The rule enmeshes federal courts in essentially standardless supervision-of-service review, from which many municipal actions that raise the least plausible Sherman Act concern – and the weightiest federalism sensitivities – are likely to emerge *without Parker* immunity. Government actors who receive immunity must obtain it through the very "heavily factual" litigation that the doctrine is meant to protect against. And private parties, whose participation is indispensable to implementation of important State policies and programs, face the threat of heavy damages, imposed because a court determines that a government actor should have more closely supervised their "service." Indeed, because exclusive *government* provision remains a realistic option in many of these cases, including this one, the practical result of the rule will be to give market competition less sway.

The need for review is underscored by the Second Circuit's further holding – that governmental defendants whose actions have been judicially determined meet the *Hallie* test, must face further litigation (and potential liability) under the "supervision of service" theory – and by its rationale for that ruling, *i.e.*, that the "federalism-based concerns" presented in a case such as this one are subdued.

I. Conditioning Immunity On Governmental Supervision Of Service Quality Has No Support In State Action Immunity Case Law

A. The Second Circuit's Rule Conflicts With Decisions of The Other Courts of Appeals

Although the factual pattern presented in this case – a local government decision designating a single entity to provide a particular service to those within its borders – is "commonplace," *see Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n,* 197 F.3d 560, 565 (1st Cir. 1999), the appeals court's decision – to condition antitrust immunity on "active supervision" of the designee's *performance* – is both singular and contrary to precedent.

1. In two pathmarking 1985 decisions, this Court established that while the status of the *defendant* should not affect the *Parker* immunity analysis, *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56 (1985), the nature of the *action* at issue – whether the action challenged is "municipal" or "private" in character – has large significance. *Hallie.* Because municipalities can be "presume[d to] act * * * in the public interest," 471 U.S. at 45, and because the core concern of the Sherman Act is with "*private* price-fixing," *id.* at 47 (emphasis in original) – and because the "clear articulation" requirement provides adequate protection against the "only real [antitrust] danger" that municipal action threatens, *i.e.*, "further[ing] purely parochial public interests at the expense of more overriding state goals," *id.* – *Hallie* held,"active [governmental] supervision" – a requirement in cases where the challenged decision is "private," *Midcal* – need not be inquired into. *Id.*

2. Since then, federal courts have adjudicated assertions of immunity in antitrust challenges brought, as this one was, by a plaintiff denied entry to a local market as a consequence of a municipality's designating – by contract, franchise award, or ordinance – a competitor as the exclusive provider of some service within city limits. These decisions, from almost every Circuit (including the Second, prior to the

ruling below) involve a broad range of local government activities, and, almost uniformly, have treated the *Hallie* analysis – *i.e.*, whether State law authorized the local government's action and whether the effect on competition was foreseeable – as dispositive. *See Michigan Pay-Tel Joint Venture v. City of Detroit*, 287 F. 3d 527, 538 (6th Cir. 2002) (pay telephone franchise); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984) (cable television); *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir.1985) (solid waste removal); *Taxicab Drivers' Employees v. Greater Houston Transp. Co.*, (5th Cir. 1985); *Hillman Flying Service, Inc. v. City of Roanoke*, 652 F. Supp. 1142 (W.D. Va. 1987) (civil aviation services), *aff'd* 846 F.2d 71 (4th Cir. 1988) (table); *Buckley Construction, Inc., v. Shawnee Civic & Cultural Development Auth.*, 933 F.2d 853 (10th Cir. 1991) (public construction project); *see also Omega Homes, Inc. v. City of Buffalo*, 4 F. Supp. 2d 187 (W.D.N.Y. 1998)(granting single developer right to build all homes in neighborhood), *aff'd*, 171 F.3d 755 (2d Cir. 1998) (*per curiam*). *But see Englert v. McKeesport*, 637 F. Supp. 930 (W.D. Pa 1986); *cf. Southern Disposal, Inc. v. Texas Waste Management*, 161 F.3d 1259 (10th Cir. 1998) (citing, but not applying "active supervision" requirement); *Michigan Pay-Tel*, 287 F.3d at 536 (noting lack of clarity in prior Sixth Circuit case law).[11]

3. A similar approach has been followed in challenges to exclusive State designations. *See, e.g., Neo-Gen, Inc. v. New England Newborn Screening Program*, 187 F.3d 24 (1st Cir.

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[11]Although the district court in *Englert* – which also involved a complaint by an electrical inspector about an exclusive designation – held that immunity required the local government's supervising the prices charged by its designee, it questioned whether plaintiff, whose "injuries * * * flow[ed] from * * * the exclusive arrangement between the [municipality and the service provider] – rather than (alleged) "unsupervised fee-setting" – would have *standing* to challenge the rates, *id.* at 935, highlighting a further defect in EII's case. Ultimately, the Third Circuit held the antitrust claims failed for *yet* another reason applicable here: the absence of required concerted action. *See* 872 F.2d 1144 (3d Cir. 1989).

1999) (exclusive State designation of neonatal screening provider); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987); *see also* 1A AREEDA & HOVENKAMP, ANTITRUST LAW (2000) ¶221d7 at 373 & n. 61 (noting cases and explaining that "where a state agency contracts exclusively for garbage disposal or bus service with private parties, it is reasonable to presume that such a monopoly is consistent with public needs").[12]

4. In analytically similar cases arising from exercises of local zoning powers, courts have treated State authorization as dispositive. For example, in *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991), the court sustained immunity for zoning decisions favoring downtown business interests over would-be suburban shopping mall developers, upon finding *Hallie* authorization – without inquiring into the sufficiency of any governmental "supervision" that downtown stores might receive.

This Court's most recent local government immunity case, *Omni Outdoor*, is to the same effect. Addressing a claim that a municipal ordinance left plaintiff's competitor with 95% of the local billboard advertising market, the Court held that both the municipality and the private defendant were entitled to immunity, based solely on the outcome of the *Hallie* inquiry. Indeed, the principal thrust of the *Omni* opinion was that even when shown to have been "taken pursuant to a conspiracy with private parties," "governmental *regulatory* action" may not be "deemed private – and therefore subject to antitrust liability."[13]

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[12]These courts have been required to resolve a question, expressly left open in *Hallie*, *see* 471 U.S. at 46 n.10, but not presented here: whether State executive agencies and political subdivisions other than municipalities must meet the authorization and active supervision requirements.

[13]499 U.S. at 375. As we discuss below, the *Omni* Court declined to address miscellaneous allegations of trade libel and other private anticompetitive conduct, seeing these as distinct from the question of immunity for actions in which both defendants had a part.

5. As the district court in this case recognized, the principle on which these decisions rest is one fully applicable here. The *Hallie* standard governs when the harm to competition is the product of government, rather than private, action.

> The basic question in antitrust cases that involve municipal and private actors is whether the municipality or the regulated party made the effective decision that resulted in the challenged anticompetitive conduct. If the municipality * * * was the effective decision maker, then the private actor is entitled to state action immunity, regardless of state supervision.

Michigan Pay-Tel, 287 F. 3d at 538. *See also Mass. Sch. of Law at Andover v. ABA*, 107 F.3d 1026, 1036 (3d Cir. 1997) (explaining that *Midcal* test applies in "situations where private parties were engaging in conduct * * * which led directly to the alleged antitrust injury"); *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1499 (10th Cir. 1997).

6. Here, once the designation of the Board was effected – action taken *by Islandia* unilaterally and pursuant to State authorization – the harm *to competition* (and the injury to EII) was complete. The alleged delays and deficiencies in service impose no further harm on competition (or on EII).

B. The Factual Allegations Do Not Meaningfully Distinguish This Case From Exclusive Designation Cases Applying The *Hallie Standard*

Although the Second Circuit's decision indicated that "possessing" a monopoly might not in itself trigger the *Midcal* inquiry, it stressed that allegations that the Board was "abusing" its monopoly, by providing "low-quality-service" "pursuant to the monopoly" required "active supervision" analysis. *See* App. 24a (distinguishing *Cine*, on the ground that it had only involved allegations of "entering into a contract" with the governmental actor).

These distinctions are not tenable. Were the Second Circuit rule the law, "low quality service" allegations could be

readily leveled, and many of the actions – properly – held immune in exclusive designation cases just discussed likely could not meet the additional "active supervision of service" requirement. *See Motor Carriers*, 471 U.S. at 57 ("We decline to reduce *Parker's* holding to a formalism that would stand for little more than the proposition that [the plaintiff] sued the wrong parties").

1. To the extent, as the Second Circuit suggested, that the distinction between exclusive government *contracts* and municipal *resolutions* has relevance, it would not favor denying immunity here. The principal difference between long-term contracts and resolutions is that if EII could convince either Islandia's Trustees, or the voters to whom they answer, that its entry would enhance service, the exclusion would end promptly. By contrast, where there is a contract, the public can be saddled with its terms, no matter how ill-advised, for long periods of time. *See Cine* (99-year lease term); *Charley's Taxi*, 810 F.2d at 872 (15-year contract for airport taxi service). *See Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993) (*en banc*) (plurality) (contrasting contractual commitments, which must be kept "by virtue of the contract clause of the Constitution," with legislation, *i.e.*, "[w]hat one City Council enacts, another may repeal"); *see also Hallie*, 471 U.S. at 45 n.9 (highlighting ways in which "municipal conduct is * * * exposed to public scrutiny").[14]

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[14]Although the Board receives its fees from individuals, where in some contract cases, the government pays the provider, others involve contracts where the "designee" pays the government for the privilege to charge third parties. *See Cine*; *see also Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989) (sustaining provision mandating that lawyers purchase malpractice insurance from bar). The contract/resolution distinction is especially irrelevant where allegations involve *service*, which – however paid for – is provided *to* the public, and if there were a contract, Islandia obviously could fund its obligation by charging a fee to those whose properties are inspected. *See Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001) (governments "have to get revenue somehow, and the 'somehow' is not [ordinarily] the business of the federal courts"). Indeed, a dissatisfied Islandia resident may seek redress against an inspector without

2. The appeals court's decision seriously overstates the significance of the boilerplate allegations of "monopoly abuse" here. Even if the "only alleged antitrust violation" in the *Cine* "was entering into a contract," the disappointed-competitor plaintiff in that case surely *could have* alleged that the Nederlander Organization was insufficiently prompt in filling ticket orders for the Broadway shows it staged "pursuant to the exclusivity" at issue there, see App. 27a (noting that *Cine* plaintiffs had asserted that "'collusive and monopolistic' pricing policies" would result from challenged decision) – and the plaintiff in *Omni* could just as readily have alleged that COA was not responding quickly enough to its customer requests. In fact, *Charley's Taxi* held defendants immune, despite findings of the district court (which had undertaken a *Midcal* analysis), to the effect that the governmental defendant:

> does nothing * * * to ensure adequacy of the provision of taxi service, and in fact has no control over the SIDA taxi drivers * * * * [the private agency] runs its own dispatch service, and no one from the state monitors this * * * * Complaints about taxi drivers are routed to SIDA for action rather than being dealt with by the state.

562 F. Supp. 712, 723 (D. Haw. 1983); *See generally Mass. Food Ass'n*, 197 F.3d at 565 (describing laws limiting "the number of taxicabs to be operated" and the number of cable franchises awarded as "examples of commonplace state or local regulation, sometimes accompanied by local price

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having to establish that she was the third-party beneficiary of a government contract.

Notably, if the designation were by contract, the nature of the service and the dollar amounts involved are such that New York's competitive bidding statute would not apply. *See N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth.*, 88 N.Y. 2d 56 (1996); *Schulz v. Cobleskill-Richmondville Sch. Dist.*, 197 A.D. 247 (3d Dep't 1994) (limiting requirements for professional services contracts). The net result is that State law would allow the Village to prefer a high bidder – but a disappointed competitor could sue under *antitrust* laws based on allegations about the "quality" of service rendered.

regulation but sometimes not").

3. Ironically, this case is distinguishable from many of the others by the fact that Petitioners *could* satisfy a supervision requirement. Unlike cases like *Cine* or *Jacobs, Visconsi*, where the municipalities could not claim to have retained control over the service rendered to customers, the Village, as a practical matter, examines each inspection report, and in the course of other inspection responsibilities, scrutinizes first-hand the buildings inspected by the Board – which (unlike the lessee in *Cine*) has a direct incentive to address the concerns of customers (*i.e.*, the Trustees' constituents).

C. Allegations Of Low-Quality Service Do Not Trigger A Supervision Inquiry

The necessary implication of the Second Circuit's decision – that other courts' exclusive designation decisions are only "technically" correct, in view of plaintiffs' "failure" to allege insufficient supervision of quality – is an untenable one.

1. Under a proper reading of this Court's precedents, allegations of "low quality service" in *Omni would not have* warranted a switch to the *Midcal* "active supervision" analysis. The state action immunity doctrine does not impose a free-floating obligation to "supervise" private conduct generally – or even private conduct "pursuant to a [government-conferred] monopoly." (Nor, as we discuss below, does an allegation that "supervision" would improve "service" bear on whether supervision is required by *antitrust law*).

Instead, the concerns the active supervision requirement "designed to address" arise only when private, *anti-competitive behavior* is defended on the ground that the State authorized it. 1A AREEDA & HOVENKAMP ¶224 at 413 ("State supervision prevents the injury the antitrust laws ordinarily prevent"). Thus, as Judge Posner explained, in a decision rejecting an antitrust claim arising from a grant of an

exclusive license to provide prison phone services:

> Plaintiffs' real argument * * * is * * * that a monopolist, namely the State of Illinois (and its subdivisions), exercising as it does an iron control over access to the inmate market, has rented pieces of the market to different phone companies, in much the same way that an airport will charge a high fee to concessionaires eager to sell to the captive market represented by the airline passengers who perforce spend time in the airport. * * * * The concessionaires will pass on much of the fee to their customers, who will thus pay a higher than competitive price. States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government * * * * *Nor do the persons with whom the states contract violate the antitrust laws by becoming state concessionaires, provided those persons do not collude among themselves or engage in other anticompetitive behavior, of which charging high prices as a state concessionaire is not a recognized species.*

Arsberry, 244 F.3d at 566 (emphasis added); *Cine* 792 F.2d at 1036 ("collusive and monopolistic" pricing policies); *see generally Mass Food Ass'n*, 197 F.3d at 564 ("What is centrally forbidden is state licensing of arrangements between private parties that suppress competition – not state directives that *by themselves* limit or reduce competition") (emphasis in original).

2. The Seventh Circuit's teaching applies with even greater force here. Like "high prices," "low-quality service" may be a *consequence* of conduct that the antitrust laws prohibit, but it is not "anticompetitive behavior" triggering a supervision obligation. Indeed, the result objected to in *Arsberry*, "high prices" – though not *behavior* prohibited under the Sherman Act – are a preeminent place in antitrust law. *See Ticor*, 504 U.S. at 638 (noting "the gravity of the antitrust offense" when competitors set rates by agreement); *Hallie*, 471 U.S. at 47 (stressing absence of danger of "*private*

price fixing"). Here, there is no serious claim that competition from EII will lower the New York Board's rates: Respondent alleged that, as a non-profit, the Board charges unfairly little. Nor can it be contended, as was apparently admitted to have been the case in *Arsberry*, that Islandia's decision to limit the market is a mere revenue-raising measure. Plainly, the New York Board, which charges the same rate everywhere, makes no effort to collect "monopoly rents" in Islandia – and the Village receives nothing from the Board, in return for its designation.

Finally, as we develop below, unlike the airport leasing power hypothesized in *Arsberry* – and those at issue in other decisions sustaining immunity – the municipal power that Islandia exercised implicates the very core of its governmental responsibility: its obligation to protect life and property within its jurisdiction. Unlike goods or services whose connection to the "public welfare" is suspect, the *sole* purpose of electrical inspections is to prevent fire and the loss of life and property it can cause. *Cf. The Monopolies Case* (striking down royally granted playing card monopoly).[15]

3. Limiting the supervision requirement to *anticompetitive behavior* is consonant with the structure of the Sherman Act – and with the limitations on its reach recognized in *Parker*. Even in antitrust claims involving private commercial activities, the distinction between conduct and effect is fundamental, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (that firm's restraints have the same *effect* as concerted action is not a basis for

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[15]Although neither the Court majority nor leading commentators have been persuaded that *The Monopolies Case*, 77 Eng. Rep. 1260 (Q.B.1602), is a paradigm for Sherman Act, *but see Omni*, 499 U.S. at 386 (Stevens, J., dissenting), the monopoly condemned in that case was granted "in order to generate revenues for the crown," *id.* *See* 1A AREEDA & HOVENKAMP ¶200d at 145 (concluding, after review of legislative history and background, that "the Sherman Act was not regarded as an instrument" for striking down state-created monopolies; "Its job was to pursue *private* restraints * * * and to leave publicly-imposed restraints to other forms of government intervention").

Section 1 liability); App. 25a (noting Judge Hand's observation in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945), that a person does not violate the antitrust laws when it has monopoly "thrust upon it"). It is of paramount significance where government action concerned. *Exxon v. Governor of Maryland*, 437 U.S. 117, 133 (1978) ("if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed"); *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986).

II. Federal Court Review Of Service Supervision Is Incompatible With Principles On Which *Parker* Immunity Is Grounded

A. The Rule Intrudes Deeply On State and Local Governmental Decision Making

The premise that *Parker* immunity should be decided through a federal court's determination of the adequacy of a local government's supervision of a designee's performance is, in a real sense, a contradiction in terms.

1. As has already been emphasized, there is no class of cases – from cable television to civil aviation to zoning rules – in which "low quality service" and inadequate supervision could not be alleged. Courts already asked to decide antitrust claims brought by disappointed *low-bidders* for public contracts, *see Buckley Construction* (contract awarded to second-lowest bidder), could be required to decide suits by disappointed *higher* bidders, based on allegations that the selected entity is performing poorly, with insufficient oversight.

Indeed, this case – where the (unusual) fact that the Board's rates are uniform, published, and low, precluded EII from making a plausible *price* allegation – is a vivid illustration of the proposition that almost any designation can be challenged. *See Omni*, 499 U.S. at 375 ("exception" under consideration"would swallow up the *Parker* rule").

2. As the appeals court conceived of them, questions of "service" and "supervision" are,"heavily factual," App. 28a – meaning that an important aspect of immunity would be lost in *every* case, even when the court rules for the defendant. *See* 1A AREEDA & HOVENKAMP ¶222b at 387 ("The *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial * * * * The importance of *Parker's* status as an immunity is particularly strong when the defendant is a government agency, subdivision, or government official carrying out duties. Such entities and officials cannot be intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they ultimately win"); *accord Martin v. Memorial Hosp.*, 86 F.3d 1391, 1396 (5th Cir. 1996) (interlocutory appeal of immunity denial authorized because "an appeal after judgment would come too late to protect the right"); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) (same).

EII defined "quality of service" here to include: the promptness with which inspections are scheduled when requested; the duration and intensity of the inspections; and the time taken between inspecting and issuance of a report. The corresponding allegations of "defective supervision" included the "lack" of a regulation fixing a time limit for performing inspections and of special "recourse [for] * * * poor service [or] * * * unfair charges." It will be the terminally unimaginative competitor who cannot identify *some* similar, comparably "factual," allegation about its rival's service – or hypothesize some form of missing, corrective government supervision.

3. Even on a fully developed factual record, there will be no principled basis by which a federal court could decide whether the quality of service is unacceptably low or the supervision too slack. On the contrary, evidence may disclose that the designee was selected because of its thoroughness and integrity – despite a reputation for taking longer (or charging more) than a competitor; or that choosing a

seemingly less expensive, unproven provider would raise risks and monitoring costs. *See Buckley Construction*. Such review would be at least as "vague [and] impractical" as the "*ex post facto* judicial assessment of 'the public interest,'" rejected in *Omni*. *See* 499 U.S. at 377; *see also Community Communications Co. v. Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting) (expressing concern that rule would open "Pandora's Box," requiring "federal courts * * * to engage in * * * wide-ranging, essentially standardless inquiry into the reasonableness of local regulation").[16]

4. This inescapable unpredictability is of special concern to parties in the New York Board's position, who, in the absence of immunity, face potential treble damages liability under the Sherman Act. Under the Second Circuit's rule, the Board's immunity – depends on a federal court's *ex post* judgments about (1) the quality of its "service" *and* (2) the means by which the local government has opted to oversee its performance. Beyond their obvious unfairness, immunity rules that make private party involvement so perilous interfere with the ability of *State and local* governments to pursue programs that *Parker* is meant to protect. *See Motor Carriers*, 471 U.S. at 56.[17]

B. No Sherman Act Purpose Is Served By Requiring

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[16]*See Mass Food Ass'n*, 197 F.3d at 564 (close judicial review "might well [produce] more competition and greater consumer welfare. But it would come at the cost of second-guessing the democratically elected legislature's decisions about the proper balance between competition and other social policies that are commonly reflected in such legislation").

[17]Although the majority in *Ticor* noted the anomaly of holding a private party liable based on deficiencies in government review – but adjudged it tolerable in view of the "gravity of the antitrust offense," at issue, 504 U.S. at 638, allegation of "low quality service" (made by a would-be competitor) surely does not similarly tip the scales. *See* 504 U.S. at 647 (O'Connor., J., dissenting) ("Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive").

Supervision Of Traditional Public Services

As *Hallie* and *Omni* underscore, the review just described entails vast federalism costs, and – even leaving aside chilling effects and resources diverted – it is by no means certain that the results with judicial review will be convincingly "better" than the initial municipal decision. But those decisions also remind that even if there were substance to claims that "supervision" would improve "service," these grievances– that government is not serving the interests of its constituents – do not sound in antitrust. *See Omni,* 499 U.S. at 375 ("vindicat[ing] * * * principles of good government" is not "the end" to which the Sherman Act is "directed"); *cf. Lease Lights, Inc. v. Public Serv. Co.,* 849 F.2d 1330, 1334 (10th Cir. 1988)("The constitutional invalidity of the attempted state regulation is not an appropriate basis for disregarding state action immunity").

1. Municipal actions that yield results that are anticompetitive or objectionable can give rise to State remedies, *Fisichelli v. Town of Methuen,* 956 F.2d 12, 14 (1st Cir. 1992), and where the claim is poor service to constituents, those aggrieved have recourse to the ballot box. *Mass. Food Ass'n*, 197 F.3d at 566 ("unless * * * a statute licenses or commands a *private* restraint, this is a matter for the voters and not for the federal courts – at least so far as the Sherman Act is concerned"). These constraints on municipal action — imposed from "above" and "below" – undergird the "presum[ption]," formulated in *Hallie*, 471 U.S. at 45 and affirmed in *Omni* (on difficult facts) that acts of municipal government are in public interest.

2. That presumption must apply with maximal force where the "service" at issue is one that traditionally performed by government – and that is bound up with public safety. *Cf. California Dental Ass'n v. FTC.*, 526 U.S. 756, 771-72 & n.10 (1999) (noting need to take "'public service aspect'" into account where antitrust claims arise from the "professional context") (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 (1975)).

3. Legislation mandating inspections is premised on recognition that, were matters left to the "market," properties that, as a matter of public safety, should be inspected, would not be. 1A AREEDA & HOVENKAMP, ANTITRUST LAW (2000) ¶221d7 at 373 ("[t]he fact that * * * states or local governments find it useful to engage in self-provision and even to "monopolize" some services * * * may suggest the state's conclusion that a competitive market will not adequately meet the public needs for such services").

Indeed, EII's accusations of cursory inspections (wholly false on the record in this case) actually make a similar point: that "consumers" in such a market – often eager to take occupancy of properties without major remedial expenses – cannot be counted on to prefer "high quality," *i.e.*, careful, inspections. *See Camara v. Municipal Court*, 387 U.S. 541, 552-53 (1967) (Clark, J., dissenting) (explaining that "[i]mmediate prospects for costly repairs" leads large percentages of homeowners to deny entry to inspectors under voluntary safety programs).[18]

4. Although the decision below repeatedly described Islandia's action as "*displac[ing]* competition * * * with a regulatory structure," App. 19a (quoting *Motor Carriers*, 471 U.S. at 64), the reality – acknowledged by all parties and in the Second Circuit decision, *see id.* 15a – that inspections are a service that the Village could itself provide on an exclusive basis is also of substantial practical significance.

This difference is significant because, unlike in *Ticor* or *Midcal*, the likely alternative is not a return to market forces – but rather exclusive provision, with government performing the service. The net result would then be no increase in competition – and a change in "service" that Islandia's Trustees have determined would be for the worse. *See Motor Carriers*, 471 U.S. at 61 (Congress did not "intend[] to resolve

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[18] In a district court affidavit, the Board's Vice President explained that the fact that inspectors do not receive additional compensation for successive visits to the same property creates a tension between profit-seeking and safety responsibilities. Ct. App. J.A.733 (Rowe affidavit).

conflicts between two competing interests [*i.e.*, federalism and competition] by impairing both more than necessary").

5. Such a state of affairs will not be an isolated phenomenon. If the Second Circuit's regime – making less-than-all-out competition prohibitively risky for all involved – were the norm, many localities inclined to consider or experiment with private provision will opt to continue municipal provision.

As the court in *Catalina Cablevision* explained, in a somewhat different context, the Sherman Act's interest in competition will not always be advanced by presenting government actors with an all-or-nothing choice.

> Tucson has just begun to regulate cable television. It is not unreasonable for not licensing all service providers at once. After some experience gained with the first provider, the City may wish to reassess its needs and will be better able to anticipate problems not obvious at the outset. Caution in granting license to additional service providers, as other Arizona cities appear to have exercised, would seem to be the prudent course of action for the City to take.

745 F.2d at 1270; *see also Motor Carriers*, 471 U.S. at 59 (stressing that States may pursue a "balance between the efficiency of collective ratemaking and the competition fostered by individual submissions").

C. Allegations Of Failure To Supervise "Retaliatory Threats" Do Not Alter The Immunity Analysis

Although the appeals court made clear that claims of "low quality service" were sufficient in themselves to alter the immunity analysis, it also indicated that Islandia might be liable based on "failure" to "actively supervise" the Board's alleged retaliatory threats.

1. At the outset, those miscellaneous allegations should not have detained the appeals court, let alone led it to re-shape immunity decision. *See Omni*, 499 U.S. at 384 (remanding claims of "private anticompetitive actions such as

trade libel, the setting of artificially low rates, and inducement to breach of contract"). They were pleaded with extraordinary ambiguity in EII's complaint and were not substantiated with any evidence at summary judgment.

The notion that the Board's power in the Islandia "market" – which is not only 1 of 1,000, but one of the smallest among the 1,000 – could be leveraged to foreclose competition is implausible on its face. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). There was no evidence – or even an *allegation* – of an *effect on competition* in any market *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993) (observing that "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors.*'"and that "federal antitrust laws * * * do not create a federal law of unfair competition") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962));

2. But even if the allegations had been substantial, the imposition of an "active supervision" requirement was contrary to settled law. The *Midcal* inquiry is not triggered by allegations that State or local government has failed to supervise private anti-competitive conduct within its jurisdiction; it attaches only when the government actor has *authorized* the anti-competitive conduct. *See Hallie*, 471 U.S. at 46 (describing requirement as performing an "evidentiary function," *i.e.*, "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy").

Thus, in *Patrick v. Burget*, 486 U.S. 94 (1986), and *Ticor*, the claim was that the State, having authorized private parties to engage in actions the Sherman Act would ordinarily condemn – group boycotts and collective price-setting, respectively – must police that conduct. *See Patrick*, 486 U.S. at 100 (active supervision "prong" reached after "the challenged restraint [is shown to] be 'one clearly articulated and affirmatively expressed as state policy'") But here, obviously, there is no suggestion that any New York law or Islandia ordinance *authorized* the supposed threats. *See*

Northern Securities Co. v. United States, 193 U.S. 197, 338 (1904) (companies' State charters did not mean that challenged merger "was under the authority of the states").[19]

The decision in *Omni* is instructive. As noted above, although the plaintiff had alleged "private," "anticompetitive" acts no less "pursuant to" the challenged ordinance than the allegations here, the Court did not treat those as a basis for imposing a supervisory liability on the municipal defendant. 499 U.S. at 384.

3. Although The Village could withdraw the designation if presented with serious enough proof of unfair competition by the Board, the Sherman Act obviously does not impose an affirmative *duty* to root out and prosecute business misbehavior. *Cf. Printz v. United States*, 521 U.S. 898 (1997). *see City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979) (cities may not sue as *parens patriae*).

III. The Second's Circuit's Decision To Require The Village To Defend This Suit Is Contrary To Precedent

Although the Second Circuit's reinstatement of the claims against the Village was closely bound up with its fundamentally erroneous interpretation of "active supervision" – and would be reversed on that basis – that ruling extends the decision's flawed analysis and raises further reason for this Court's review.

1. For many of the reasons already stated, the conclusion that "federalism based concerns" are "less pressing" than usual in this case is a jarring one. The suit arises from a municipal decision concerning public safety inspections within municipal borders – and involves a claim (by a would-be competitor of the designated provider) that this traditional municipal service is not being performed as well as it would

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[19]Although the court described these alleged transgressions as "pursuant to" the monopoly conferred by Islandia, the same could be said of the Patent Office, when a patentee makes unlawful use of its market power.

if the Village took a more proactive supervisory role. The "market" at issue is one for which it is conceded that municipal governments may, based on their assessment of the public interest, exclude all private provision.

2. The Second Circuit's stated reasons for its contrary conclusion – that the case involves a village, rather than a "sovereign" State, and that "only" prospective relief was sought against Islandia, are squarely at odds with this Court's case law.

3. Although State action precedent has consistently recognized that municipalities do not *automatically* enjoy "sovereign" status, *see Lafayette*, it has been equally clear that they "draw their legal life from state law," *Fisichelli*, 956 F.2d at 14 – and when action is "authorized" in the full sense set out in *Hallie*, as both courts here found Islandia's designation to have been – it *is* that of the State. *See Omni*, 499 U.S. at 377 ("personal liability of *city* officials" would intolerably "compromise *the States'* ability to regulate their domestic commerce") (emphasis added). As that case underscored: "*any* action that qualifies as state action is *ipso facto* * * * exempt from the operation of the antitrust laws." *Id.* at 379 (citation omitted).

Nor are "federalism concerns" confined to concerns of State sovereignty. *See Omni*, 499 U.S. at 370 (immunity is grounded on "principles of federalism *and* state sovereignty") (emphasis added). *Hallie* explained that a stringent authorization requirement should not be imposed, in part because of the "deleterious and unnecessary" effects it would have on "municipalities' local autonomy and authority to govern themselves"; *See also Spallone v. United States*, 493 U.S. 265, 276 (1990) ("federal courts * * * must take into account the interests of state and *local authorities* in managing their own affairs") (citation omitted, emphasis added); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Boulder*, 445 U.S. at 70 (Rehnquist, J., dissenting) (noting absence of "distinction between States and their subdivisions with regard to the pre-emptive effects of federal law").

4. The premise that Islandia was "only" facing the risk of a trial, and a possible injunction – but not damages – is no more sound. As explained above, "[t]he *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial" 1A AREEDA & HOVENKAMP at 387. To leave the issue to be sorted out *after* "costly litigation," *id.*, is to sap it of much of its value. *Martin*, 86 F.3d at 1396 ("an appeal after judgment would come too late to protect the right").

5. The Second Circuit's rule is all the more extraordinary given that the court had already held that the *only action* of the Village that was at issue – the designation – was within its authority under State law. Although the Second Circuit gave far too much credence to EII's allegations that the Board was improperly expanding market share, *see supra*, its decision attached great significance to the Village's *non*-involvement in such unsavory (alleged) behavior. *See* App. 25a (underscoring that these were "transactions [between the Board and] other private parties").

Although the court described the alleged threats as "pursuant to" the resolution, there was no allegation that Islandia neither participated in, benefitted from or was aware of any such conduct, *see* 15 U.S.C. § 1, nor that it intended to monopolize any market. *See Times-Picayune Pub. v. United States,* 345 U.S. 594, 627 (1953). To the extent the court assumed the Sherman Act liability can be imposed for failing to prevent unauthorized private anticompetitive activity, that cannot be so. *See supra*.

Finally, although the court asserted that the Village could be kept in the case to assure that a remedy, in case of liability, "would be []adequate," it offered no reason for assuming that, in the (extraordinarily improbable) event of a decision that the Board had violated the Sherman Act by supposed "private" retaliatory threats, any congressionally authorized remedies would be inadequate.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

Donald T. Rave, Jr.
LAW OFFICES OF
DONALD T. RAVE
11 The Plaza
Locust Valley, N.Y. 11560
(516) 671-1295

David T. Goldberg
Counsel of Record
LAW OFFICE OF
DAVID T. GOLDBERG
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

Frank Ambrosino,
REILLY, LIKE, TENETY &
AMBROSINO
179 East Neck Road
Babylon, N.Y. 11704
(631) 669-3000

Counsel for Petitioners

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320 F.3d 110

(Cite as: 320 F.3d 110)

United States Court of Appeals,

Second Circuit.

ELECTRICAL INSPECTORS, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

VILLAGE OF EAST HILLS, Village of Roslyn and Village of Oyster Bay Cove,

Defendants-Counter-Claimants,

Village of Islandia, Alexander Pirnie and New York Board of Fire Underwriters,

Defendants-Counter-Claimants-Appellees,

Village of Island Park, Village of Brookville, Village of North Hills, Village

of Flower Hill, Village of Great Neck, Village of Great Neck Estates, Village

of Kings Point, Village of Port Washington North, Village of Sea Cliff, Village

of Saddle Rock and Village of Baiting Hollow,
Defendants.

Docket No. 01-9483.

Argued: June 17, 2002.

Decided: Dec. 13, 2002.

Amended: Jan. 17, 2003.

Before: CALABRESI, SACK, and B.D. PARKER, Circuit Judges.

SACK, Circuit Judge.

This appeal requires us to determine whether the state-action immunity doctrine shields a municipality and a private corporation from alleged federal antitrust-law violations resulting from the municipality's conferral upon the corporation of exclusivity in the market for government-required electrical inspection services within the municipality.

The defendant Village of Islandia (the "Village") is a municipality located on New York's Long Island. In 1988, the Village adopted a policy of requiring building owners to obtain certificates of occupancy from the Village, and conditioning the issuance of such certificates on the positive results of an electrical wiring inspection conducted by the not-for-profit defendant New York Board of Fire Underwriters (the "Board"). Any property owner who wishes to use or occupy a building is required to submit to and pay the Board for the Board's inspection. The plaintiff, a for-profit corporation that also provides electrical inspection services in the State of New York, brought suit against both the Village and the Board in the United States District Court for the Eastern District of New York alleging that this arrangement resulted in violations of the Sherman Act and other federal and state laws. The district court (Leonard D. Wexler, *Judge*) concluded that the Village's policy was authorized by an act of the New York State Legislature, and that the actions of the Village and the Board were therefore exempt from the federal antitrust laws under the state-action immunity doctrine. *Elec. Inspectors, Inc. v. N.Y. Bd. of Fire Underwriters,* 145 F.Supp.2d 271, 279 (E.D.N.Y.2001) ("*EII* ").

We agree with the district court that for purposes of the state-action immunity doctrine, the state authorized the

Village to pass the ordinance that gave the Board exclusivity with respect to the performance of wiring inspections in Islandia. We disagree, however, with the district court's holding that this finding is sufficient in itself to support a dismissal of the plaintiff's federal antitrust-law claims. We conclude that such immunity for the Board against the plaintiff's claim for damages, and possibly for the Village against the plaintiff's claim for equitable relief, requires a finding that government officials actively supervised the Board. We therefore vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

In 1981, the New York State Legislature enacted the Uniform Fire Prevention and Building Code Act (the "Act"), N.Y. Exec. Law § 370 *et seq.* The Act required the creation of a state-wide uniform fire code for commercial and residential buildings, *id.* § 377, and it directed New York's various local governments to "administer and enforce the uniform ... code," *id.* § 381(2). To facilitate local governments' carrying out of their enforcement responsibilities, the Act directed the New York Secretary of State to "promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform ... code," *id.* § 381(1), and gave the Secretary powers to ensure that local governments enforced the code in compliance with the Secretary's regulations, *id.* § 381(4). The Act required the regulations issued by the Secretary to address, *inter alia,* the frequency of building inspections and the number and quality of inspectors. *Id.* § 381(1).

Pursuant to the Act, the Secretary issued regulations providing that any property owner who wishes to use or occupy a commercial or residential building must obtain a certificate of occupancy from a local government body. N.Y. Comp.Codes R. & Regs. tit. 19, § 429(c)(1) (repealed 1996). Local governments, in turn, were forbidden from issuing a

certificate of occupancy for any building unless a designated officer or agent inspected the building's electrical wiring and certified that it complied with the uniform electrical code. *Id.* § 429(b)(1) (repealed 1996). Finally, the Secretary's regulations (later withdrawn) authorized local governments to pass resolutions designating those who would conduct such inspections. The specified options were (1) "a designated officer or employee of the city, town, or village"; (2) "an employee or agent of another city, town, or village who is qualified to conduct such inspections"; (3) "a person who is qualified to conduct such inspections ... pursuant to a contract with the city, town, or village"; (4) "an employee or agent of the county who is qualified to conduct such inspection"; and (5) "a competent inspector, designated or approved by the city, town, or village." *Id.* § 429.2(b)(2)(i)-(iv) (repealed 1996).

Pursuant to those regulations and prior to their repeal, on August 4, 1988, the trustees of the Village passed an ordinance resolving that the Village "accepts [the Board] as its only electrical inspecting agency." Thereafter, the Village required all applicants for certificates of occupancy to present proof that the Board had inspected the electrical wiring in their buildings and certified that it complied with the National Electric Code.[1]

The Board is a not-for-profit corporation that received its charter from the New York State Legislature in 1867.[2] Its members are ninety-six insurance companies authorized to write fire insurance policies in New York. According to an

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[1]The National Electric Code is "a model code promulgated by the National Fire Protection Association," *Edison Elec. Inst. v. Occupational Safety & Health Admin.*, 849 F.2d 611, 614 (D.C.Cir.1988), which is "an international nonprofit membership organization," *see NFPA Overview, at* http://www.nfpa.org/Home/ AboutNFPA/NFPAOverview/NFPAO verview.asp (last visited December 12, 2002).

[2]On April 1, 1930, the New York State Legislature reconstituted and continued the Board "as a body, corporate and politic, in perpetuity."

affidavit submitted by defendant Alexander Pirnie, the Board's former president,[3] the Board engages in two principal activities: It maintains the New York City Fire Patrol, a group of patrolmen who assist New York City's firefighters, and it inspects electrical equipment and issues certificates of compliance with the National Electric Code. Pirnie Aff. ¶¶ 4, 11. Approximately 250 New York municipalities have adopted policies that, like the Village's, effectively require building owners to obtain certificates of compliance from the Board. *Id.* ¶ 12. The Board charges a fee for inspections to be paid by the property owner.

The plaintiff, Electrical Inspectors, Inc., is a for-profit corporation that, like the Board, inspects electrical wiring in commercial and residential properties in New York State and issues certificates of compliance with the National Electric Code. On March 1, 1999, the plaintiff brought this action in the district court against fifteen New York municipalities including the Village; on September 9, 1999, it amended its complaint to name the Board as a defendant. The plaintiff alleged various violations of the Sherman Act, 15 U.S.C. §§ 1 & 2, the Donnelly Act, N.Y. Gen. Bus. Law § 340(1), its federal due process rights, and its federal and state equal protection rights. According to the amended complaint, the municipalities' policies of conferring monopoly power within their respective boundaries on the Board were unauthorized by state law and had the illegal effect of excluding the plaintiff from local markets for electrical inspection services. Amend. Compl. ¶ 139. The plaintiff also alleged that the Board actively sought and maintained such grants, and abused its exclusive positions by providing low-quality service and by seeking to expand its overall market share by threatening to retaliate in those locations where it has exclusivity against customers who use the plaintiff's services

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[3]The distinction between the Board and Pirnie is not relevant for purposes of this appeal, and our legal conclusions regarding the Board apply equally to Pirnie.

where competition is allowed. *Id.* ¶¶ 52, 69, 72, 112, 118.[4] The plaintiff sought monetary damages against the Board, and injunctive and declaratory relief against the municipalities, for their asserted violation of the federal antitrust laws.

The defendants assert in their answer, *inter alia,* that they are immune from the plaintiff's federal antitrust-law claims under the state-action immunity doctrine. The plaintiff moved to strike this defense as insufficient pursuant to Federal Rule of Civil Procedure 12(f), and the defendants cross- moved for summary judgment on the federal antitrust law claims.

On March 30, 2001, the district court issued a Memorandum and Order denying the plaintiff's motion to strike and granting the defendants' motion for summary judgment. *EII,* 145 F.Supp.2d at 279. The court held that the municipalities were immune from federal antitrust liability on the grounds that the Act gave them "broad ... authority over a matter integral to public health and safety," and that appointing exclusive agents to conduct required electrical inspections was "a 'foreseeable' consequence of the state delegation of authority." *Id.* at 277-78. The district court then concluded that the municipalities' immunity under the state-action doctrine extended to the Board. "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *Id.* at 279 (citing *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.,* 790 F.2d 1032, 1048 (2d Cir.1986)).

On September 21, 2001, the plaintiff voluntarily dismissed its federal constitutional claims against the

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[4]The plaintiff also challenged the legitimacy of the Board's status as a non-profit entity, alleging that the Board's exemption from income taxes enabled it to earn "excess profits" that accrued to the benefit of its for-profit members. Amend. Compl. ¶¶ 45, 113.

municipal defendants. The district court subsequently issued a judgment dismissing with prejudice the plaintiff's federal antitrust-law claims, and dismissing without prejudice the plaintiff's state-law claims for want of supplemental jurisdiction. The plaintiff now appeals, challenging only the district court's dismissal of its federal antitrust-law claims against the Board and the Village.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment *de novo,* construing the evidence in the light most favorable to the non-moving party. *Tenenbaum v. Williams,* 193 F.3d 581, 593 (2d Cir.1999), *cert. denied,* 529 U.S. 1098, 120 S.Ct. 1832, 146 L.Ed.2d 776 (2000). A district court must grant a motion for summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law," Fed.R.Civ.P. 56(c), i.e., "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

II. State-Action Immunity for the Village

The Village regulates the usage of local real estate by

requiring all owners of commercial and residential buildings who wish to use or occupy their property to obtain from the Village a certificate of occupancy. In order to do so, for reasons of fire safety, a property owner must, under the Village ordinance, first submit the property to an electrical wiring inspection by the Board, pay the Board's fee, and receive from the Board certification that the wiring complies with the National Electric Code. The plaintiff alleged in its amended complaint that the Village's conferral of such exclusivity on the Board violates, *inter alia,* the Sherman Act, and sought injunctive and declaratory relief.[5] The Village asserts the affirmative defense that its action was pursuant to state policy and thus was exempt from the federal antitrust laws under the state-action immunity doctrine. The district court agreed with the Village. The plaintiff challenges this holding on appeal.

Because the district court granted judgment to the Village on its affirmative defense, neither the standing of the plaintiff under the antitrust laws to make all of the underlying claims it asserts nor the merits of the claims are at issue in this appeal. Our only task with regard to the plaintiff's claims against the Village is to evaluate the district court's conclusion that the Village is immune.

A. Immunity for Municipal Economic Regulation

In *City of Columbia v. Omni Outdoor Adver., Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) ("*Omni*

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[5]The plaintiff does not allege that the Village has created a monopoly in the sense that it forbade property owners from hiring the plaintiff. The plaintiff's allegation is, rather, that the Village's requirement that every owner submit a Board-issued certificate of compliance in order to receive a certificate of occupancy effectively eliminated demand for the plaintiff's services. The implicit assumption, which we have no reason to doubt, is that property owners have little need for additional inspection services once they have obtained a certificate of occupancy.

Outdoor "), the Supreme Court addressed state-action immunity for municipal regulatory schemes. There, the City of Columbia, South Carolina, asserted immunity from a claim under the Sherman Act that its restrictions on the size, location, and spacing of billboards hindered the ability of newcomers to compete in the billboard construction market. *Id.* at 367-69, 111 S.Ct. 1344. The Court began its analysis by noting that under the state-action immunity doctrine established by its decision in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), "the Sherman Act [does] not apply to anticompetitive restraints imposed by the States 'as an act of government.' " *Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344 (quoting *Parker,* 317 U.S. at 352, 63 S.Ct. 307.) The Court explained that the doctrine is grounded in "principles of federalism and state sovereignty." *Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344. Local governments are not sovereign, and so their actions are not automatically immune under *Parker. Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344. Nonetheless, because states sometimes effect regulatory regimes through local government bodies, municipalities may avail themselves of *Parker* immunity to the extent their actions are "an authorized implementation of state policy." *Id.*

The Court held that municipalities that wish to avail themselves of *Parker* immunity must show that their regulations were authorized by the state. The requisite showing of authority has two components: First, the municipality must have "authority to regulate"; second, it must have "authority to suppress competition." *Id.* at 372, 63 S.Ct. 307; *accord Hertz Corp. v. City of New York,* 1 F.3d 121, 128 (2d Cir.1993) (holding that under *Parker* a municipality must establish that "the resulting anticompetitive activities are a foreseeable consequence of [a] state delegation" (quoting *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.,* 790 F.2d 1032, 1043 (2d Cir.1986) ("*Cine* ")), *cert. denied,* 510 U.S. 1111, 114 S.Ct. 1054, 1054, 127 L.Ed.2d 375 (1994).

To determine whether the City of Columbia had "authority to regulate," the Supreme Court looked to the terms of the relevant South Carolina statutes. *Omni Outdoor,* 499 U.S. at 371, 111 S.Ct. 1344. At the same time, the Court held that federal courts, when determining state-action immunity for municipalities, must "adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 372, 111 S.Ct. 1344. This broader concept of authority is necessary, the Court explained, because a doctrine of state-action immunity that "transform[ed] state administrative review into a federal antitrust job" would undermine "the very interests of federalism [the *Parker* doctrine] is designed to protect." *Id.* at 372, 111 S.Ct. 1344 (citation omitted). For this reason, the Court held, the inquiry into a municipality's authority to regulate should not be exacting. *Id.* at 371, 111 S.Ct. 1344. The Court went on to decide that language in the South Carolina statute authorizing local governments to regulate the height and size of "structures" constituted sufficient authority for the City of Columbia's billboard regulations. *Id.* at 372-73 & n. 4, 111 S.Ct. 1344. Although the statute also provided that municipal ordinances were valid only if they served "the purpose of promoting health, safety, morals or the general welfare of the community," the Court declined to inquire whether the city's ordinance fulfilled this requirement. *Id.* at 370 n. 3, 371-73, 111 S.Ct. 1344 (citation and internal quotation marks omitted). The Court's decision not to inquire as to whether Columbia's ordinance was actually authorized by state statute suggests that as long as the local enactment is within a broad view of the authority granted by the state, whether it is actually violative of that statute is a question for state authorities, not one of federal antitrust law.

With regard to the second component of the inquiry, i.e., whether the City of Columbia had "authority to suppress competition," the Supreme Court began by "reject[ing] the contention that this requirement can be met only if the

delegating statute explicitly permits the displacement of competition." *Id.* at 372, 111 S.Ct. 1344. Instead, the Court held, the requirement is met "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id.* (quoting *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 42, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985)). The Court then asked whether a logical relationship existed between the purpose of the state statute and its alleged anticompetitive effect, and observed that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni Outdoor,* 499 U.S. at 373, 111 S.Ct. 1344. On this basis, the Court concluded that suppression of competition was a foreseeable result of the South Carolina statute, and thus that the City of Columbia had met the requirements for immunity for its regulatory scheme. *Id.* at 374, 111 S.Ct. 1344.

The Supreme Court's analysis in *Omni Outdoor* mirrored the approach that this Court had followed in *Cine.* There we examined the actions of the New York "Urban Development Corporation," or "UDC," a public entity designed by the New York State Legislature "to make the State an active participant in the financing and construction of urban renewal projects." *Cine,* 790 F.2d at 1036. The UDC purchased theaters in the Times Square area of New York City and then awarded leases on them to private developers, prompting parties whose applications for leases had been rejected to bring suit under the Sherman Act against both the UDC and the winning bidders. *Id.* at 1037-38. The defendants claimed state-action immunity. *Id.* at 1038.

We began our analysis by holding that because the UDC was a "political subdivision of the state," it was like a municipality for purposes of the *Parker* doctrine. *Cine,* 790 F.2d at 1047. We then concluded that in order to qualify for state-action immunity, the UDC was required to "show [1]

that it acted pursuant to a clearly expressed state policy and [2] that the resulting antitrust consequences were reasonably contemplated by the state." *Id.* at 1047-48.

With regard to the first component, we found authority for the UDC's actions in language in the UDC's enabling statute that specifically empowered it to purchase, and issue leases on, real property. *Id.* at 1045. Under the second component, we concluded that harm to some businesses around Times Square was a foreseeable consequence of the creation of an entity whose purpose was to improve a blighted urban area:

> It is fair to conclude that the legislature contemplated that when it granted power to the UDC to determine what buildings and services would be provided in a particular redeveloped land use project, it knew those choices would affect businesses and residences in that entire area. Such a conclusion is based on common sense. As a result of cultural improvements, rents and property values would increase even though some competitors would be adversely impacted, and some would disappear.

Id. at 1047. On this basis, we held that the UDC had shown sufficient state authority for its actions, and thus was immune under the *Parker* state-action immunity doctrine.

B. The New York Act and the Village Ordinance

The Village argues that its actions effectively excluding the plaintiff from the market for electrical inspections within its boundaries were authorized by the Act and related regulations issued by the New York Secretary of State. To evaluate the Village's defense, we follow the two-step inquiry set forth and applied in *Omni Outdoor* and *Cine.*

1. Step One: Authority to Regulate. The Village cites two provisions of the Act for its authority to regulate: § 381, which provides that "every local government shall

administer and enforce the uniform fire prevention and building code"; and § 371, which states that "it shall be the public policy of the state of New York" to "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." N.Y. Exec. Law §§ 381(2), 371(2)(d). The Village also cites for support the regulations issued pursuant to the Act by New York's Secretary of State.

The plaintiff disagrees that the Act confers any new powers on New York municipalities that they do not already have, and argues that the statutory language cited by the Village merely directs local governments to apply to a particular purpose powers arising from other statutory sources. If the plaintiff's interpretation of the Act is correct, then the state-action immunity defense is unavailable because the Village has not identified any other specific statutory source of regulatory power, and the principle is well established that a municipality may not fall back on its general police or "home-rule" powers to immunize anticompetitive regulations. *See Cmty. Communications Co. v. City of Boulder,* 455 U.S. 40, 56, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *Hertz,* 1 F.3d at 128.

If the Village had only the language of the Act to rely upon, its authority for purposes of the *Parker* doctrine might be subject to doubt. The cited provisions can be read as no more than a direction to New York State municipalities as to how to act, in contrast with statutory language relied on by municipalities in cases in which they have been held to be immune where a similar direction was coupled with an explicit conferral of regulatory power. *See Omni Outdoor,* 499 U.S. at 370-71 n. 3, 111 S.Ct. 1344 (South Carolina statute providing that "the legislative bod[ies] of cities and incorporated towns may by ordinance regulate ... buildings and other structures"); *Cine,* 790 F.2d at 1045 (New York statute empowering the UDC "to acquire ... real, personal or mixed property[,] and to sell ... [or] lease ... the same").

We conclude, however, that the regulations issued by the Secretary soon after the passage of the state statute

make clear that even if the Village's ordinance was not actually authorized by the state statute itself, it was within the broad grant of state authority. The Secretary's regulations authorized municipalities to condition occupation and use of a building on the result of an electrical inspection, and "by resolution provide that such inspection shall be performed by [an] inspector, designated or approved by the ... town." N.Y. Comp.Codes R. & Regs. tit. 19, § 429(b) (repealed 1996). The regulations appeared to interpret the statute to authorize the Village, or at least to authorize the Secretary to authorize the Village, to do precisely that which the Village has done.[6]

We think that the Act, combined with the Secretary's apparent interpretation of it, sufficiently demonstrates the Village's broad "authority to regulate" for purposes of state-action immunity. The Village has cited statutory language that, although perhaps ambiguous on the question, can be interpreted as delegating a power to regulate, and it has cited regulations issued by the agency charged with enforcing the statute that confer a power to regulate in plain language. Even though those regulations were subsequently withdrawn, they establish the Village's contention that its action was within the broad authority to regulate granted by the state statute itself. Under the broad concept of authority that principles of federalism compel us to apply, we conclude that these sources are sufficient for purposes of *Parker* state-action immunity analysis.

2. Step Two: Authority to Suppress Competition. We also conclude that the Act and the Secretary's

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[6]While, under the principles announced *Omni Outdoor*, it is not for us as a federal court of appeals to decide on this appeal whether the Village's acts are *ultra vires*, neither do we decide that had a state court determined that the acts were *ultra vires*, we would nonetheless conclude that the municipality or the private actor was entitled to state-action immunity.

regulations establish the second component of authority that municipalities must show under *Parker*. The specific anticompetitive harm that the plaintiff alleges results from the Village's actions is the plaintiff's complete exclusion from the market for required electrical inspection services. We think that such exclusion is a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations that condition the issuance of certificates of occupancy upon inspections by town-designated agents. "[C]ommon sense," *Cine,* 790 F.2d at 1047, indicates that a municipality in the course of enforcing a fire code is likely, for quality control purposes, to limit the set of persons who may issue certificates of compliance, "even though some competitors would be adversely impacted," *id.* And common experience indicates that municipalities often use their own employees to enforce a variety of public codes, such as food preparation or building codes, thereby effectively conferring upon *themselves* exclusivity in the market for required inspection services at a cost to private entities that would perform the same services. The Secretary specifically authorized such town-operated monopolies. N.Y. Comp. R. & Regs. tit. 19, § 429.2(b)(I) (repealed 1996). Such a regime also appears to be contemplated by the section of the Act that provides that "[l]ocal governments or counties may charge fees to defray the costs of administration and enforcement," N.Y. Exec. Law § 381(2). Thus, complete exclusion of a potential competitor in the market was foreseeable.

The plaintiff argues that even if a town-operated monopoly was foreseeable, the designation of a private party as the party enjoying exclusivity was not. We think, however, that the plaintiff's argument misunderstands the nature of the foreseeability inquiry. Our task in assessing the second component of authority identified in *Omni Outdoor* is to determine whether the state intended or at least could have contemplated that its policy would result in "suppression of competition." 499 U.S. at 373, 111 S.Ct. 1344; *accord Cine,* 790 F.2d at 1047. Whom the municipality selected as the

party exercising exclusivity is at best tangential to the inquiry into the foreseeability of suppression of competition. By definition, the creation of a monopoly suppresses--indeed eliminates--all competition in that locality, and in this sense the degree of suppression is the same whether the party exercising the power arising out of exclusivity is public or private. The foreseeability inquiry requires us to go no further. *See Cine,* 790 F.2d at 1045-46 (identifying the relevant question as whether the UDC's entry into leases with private parties was foreseeable, and not inquiring into the foreseeability of its selection of any party in particular). We therefore conclude that the suppression of competition resulting from the Village's actions was a foreseeable consequence of what the state authorized.

C. The Supervision Issue with Regard to the Village

Before we can decide whether the Village is immune from the plaintiff's claims, however, we must confront yet one more issue. The plaintiff argues that for a municipality to be immune under the *Parker* state-action immunity doctrine, it must show, in addition to state authority for its regulatory scheme, that government officials actively supervise those private parties whom the municipality regulates.

Whether a municipality must make such a showing appears to be an open question. The Supreme Court held in *Town of Hallie* that a municipality need not show that it is supervised by state officials for it to qualify for state- action immunity. 471 U.S. at 46, 105 S.Ct. 1713. But the Supreme Court also indicated that "[w]here state or municipal regulation by a private party is involved, ... active state supervision must be shown, even where a clearly articulated state policy exists." *Id.* at 46 n. 10, 105 S.Ct. 1713. This raises the question of whether a failure to show active supervision of a private party can defeat *both* the municipality's claim of immunity *and* the private party's, or

only the private party's. We are not aware of any decision that squarely addresses this issue.

The law regarding the active supervision requirement has developed almost entirely in the context of claims against private parties. We will therefore return to the question of whether the Village's immunity might depend upon a showing that the Board is actively supervised by the Village after we review the plaintiff's claims against the Board.

III. The Board's State-Action Immunity Defense

The plaintiff alleged in its amended complaint that the Board violated the Sherman Act by willfully seeking and maintaining monopolies in various New York municipalities, and by abusing its monopoly power by providing low-quality service and by attempting to expand its overall market share by threatening retaliatory action against those persons who use the plaintiff's service where competition is allowed. The district court, citing our decision in *Cine,* held that the municipalities' immunity under the *Parker* doctrine necessarily also protected the Board: "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *EII,* 145 F.Supp.2d at 279. The plaintiff argues on appeal that the district court misapplied the law of state-action immunity for private parties.[7] The Board argues that the district court's holding

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[7]The plaintiff also argues that the decision of New York Supreme Court, Broome County, in *Atlantic-Inland v. Town of Union,* 126 Misc.2d 509, 516, 483 N.Y.S.2d 612, 618, collaterally estops the Board from asserting a state-action immunity defense in this case. The fact pattern of *Atlantic-Inland* was similar to that of the instant case: An electrical inspection firm, alleging violations of its constitutional rights and New York antitrust law (i.e., the Donnelly Act), sued a municipality that had designated the Board its exclusive provider of required electrical inspections. The Board intervened on the side of the municipality. The

was correct, and in the alternative that under the *Noerr-Pennington* doctrine, certain allegations by the plaintiff fail to allege an antitrust injury.[8]

A. The State-Action Defense for Private Actors

There are circumstances under which private parties may avail themselves of the *Parker* state-action immunity doctrine. The Supreme Court has explained the purpose of extending state-action immunity to private parties thus:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that

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court entered judgment against the defendants, holding that "the [municipality's] ordinance is anticompetitive and an unwarranted monopoly in violation of the Donnelly Act." *Id.* at 517, 483 N.Y.S.2d at 618. Although the court's opinion in *Atlantic-Inland* does not mention the state-action immunity defense, the plaintiff argues that the Board could have raised the defense in that case, and so its defeat precludes it from raising the defense now. The plaintiff's collateral estoppel argument fails as a matter of law. Unlike the federal antitrust laws, the Donnelly Act contemplates no state- action exception. *Elec. Inspectors, Inc. v. Village of Lynbrook*, 293 A.D.2d 537, 538, 740 N.Y.S.2d 412, 413 (2d Dep't 2002). Thus, even if the Board raised state-action immunity in *Atlantic-Inland*, rejection of that defense was not necessary to the disposition, and so that case does not preclude the Board from raising the defense here. *See Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 109 (2d Cir.2002) (collateral estoppel applies only to issues necessarily resolved in previous proceeding).

[8]In a supplemental brief that we requested at oral argument, the Board asserted for the first time a defense under the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 *et seq.* Because the Board did not raise the defense in its principal appellate brief, the Board has abandoned the defense and we do not consider it. *See, e.g., Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir.1999).

> restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker* 's holding to a formalism that would stand for little more than the proposition that [the plaintiff] sued the wrong parties.

S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 56-57 (1985) (footnote omitted) ("*Motor Carriers*").

In *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Supreme Court established that private parties must satisfy a two-prong test to qualify for state-action immunity. First, the private party must show that the alleged anticompetitive acts were pursuant to a "clearly articulated and affirmatively expressed ... state policy" to displace competition. *Id.* (citation and internal quotation marks omitted). Second, it must show that its conduct was "actively supervised by the State itself." *Id.* (citation and internal quotation marks omitted).

More recently, the Supreme Court made clear that the first prong of the *Midcal* test is not as demanding as the Court's statement of it in *Midcal* suggests. It does not, for example, require a private party to show " 'a specific, detailed legislative authorization' for its challenged conduct." *Motor Carriers,* 471 U.S. at 64, 105 S.Ct. 1721 (quoting *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)). Rather, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Motor Carriers,* 471 U.S. at 64, 105 S.Ct. 1721. For example, in *Motor Carriers* itself, the Court held that a private party accused of horizontal price fixing had satisfied the first prong of *Midcal* by showing that a state legislature had instructed a state agency to prescribe "just and reasonable" prices, and the agency, in turn, had "exercised its discretion by actively

encouraging collective ratemaking." *Id.* at 63-64.

Under the second prong of the *Midcal* test--active state supervision--a private defendant must show not only that "state officials have ... [the] power" to supervise, but also that those officials "exercise [that] power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget,* 486 U.S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). This requirement of official involvement seeks to prevent states from transforming the *Parker* doctrine, designed to accommodate the states' sovereign interest in regulating commerce, into an unbounded license for the states to issue Sherman Act exemptions to private parties. *See Motor Carriers,* 471 U.S. at 57, 105 S.Ct. 1721 ("Th[e] supervision requirement prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." (quoting *Midcal,* 445 U.S. at 106, 100 S.Ct. 937)); *Parker,* 317 U.S. at 351, 63 S.Ct. 307 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). This second part of the *Midcal* test thus serves as a counterweight to the first because it "ensure[s] that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick,* 486 U.S. at 100-01, 108 S.Ct. 1658.[9]

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[9]Municipalities need not show that the state actively supervises them for them to be immune with regard to their own anticompetitive behavior under the *Parker* doctrine because "there is little or no danger that [a municipality] is involved in a *private* price-fixing arrangement." *Town of Hallie,* 471 U.S. at 47, 105 S.Ct. 1713 (emphasis in the original). "The only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* By way of contrast, when "a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."

The Supreme Court's most recent decision applying the active supervision prong is *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). There, the Court held that arrangements whereby states authorized horizontal price fixing among insurance companies, but required the companies to file collective tariffs that state agencies had the option to reject, lacked sufficient state supervision to qualify for immunity. *Id.* at 639, 112 S.Ct. 2169. To fulfill the active supervision prong, the Court held, private parties must prove that state officials "have undertaken the necessary steps to determine the specifics" of the regulatory regime; a mere "negative option" among state agencies to reject prices proposed by private parties is insufficient. *Id.* at 638-39, 112 S.Ct. 2169. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* at 638, 112 S.Ct. 2169.

The Supreme Court followed a similar approach in *Patrick*, a case that involved an accusation by a physician that a group of his peers had conspired to deprive him of hospital privileges in violation of the Sherman Act. 486 U.S. at 97-98, 108 S.Ct. 1658. Although the defendants presented evidence of state policies encouraging physician peer review, the Court rejected their immunity claims because they had failed to show that state actors actively reviewed "private decisions regarding hospital privileges to determine whether such decisions comport[ed] with state regulatory policy and to correct abuses." *Id.* at 101, 108 S.Ct. 1658.

Although the Supreme Court has applied the two-part *Midcal* test in each of its subsequent cases involving an assertion of state-action immunity by a private party, we have twice declined to engage in an independent immunity inquiry for a private party whose alleged anticompetitive conduct was to participate in "concerted" action with a government entity authorized by the state to take such action. Our first decision in this line was *Cine*, a case which,

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Id.

as discussed in Part II.A., above, involved efforts by a state-created entity, the UDC, to improve the Times Square area by purchasing theaters and then leasing them to developers. Although the *Cine* plaintiffs asserted that "collusive and monopolistic" pricing policies would result from the coordinated action between the UDC and the private-party defendants, the only anticompetitive conduct alleged by the plaintiffs to be illegal was the private parties' seeking, and the UDC's awarding, long-term leases on theaters. 790 F.2d at 1037-38; *see also Cine 42nd St. Theater Corp. v. Nederlander Org.*, 609 F.Supp. 113, 119 (S.D.N.Y.1985), *aff'd*, 790 F.2d 1032 (2d Cir.1986) (setting forth the plaintiffs' contentions). After concluding that the UDC's actions were fully authorized by New York State and therefore immune, we held that such immunity extended automatically to the "private [parties] acting in concert with the UDC." *Cine*, 790 F.2d at 1048. We explained that "[w]hen the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC." *Id.*

Our second such decision was *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59 (2d Cir.1998), which involved alleged antitrust-law violations arising from contracts between a state-operated waste-disposal entity and private waste-disposal companies promising to honor each other's exclusive service agreements with various towns. *Id.* at 63. After concluding that the state agency's actions were authorized under a state statute and thus immune from federal antitrust-law liability, we held, relying on *Cine*, that the private companies were also immune because "[s]ubjecting them to antitrust liability would effectively block [the state entity's] efforts to carry out its mandate through contracts with private parties." *Id.* at 74. As in *Cine*, the only anticompetitive actions allegedly taken by the private-party defendants were those of

contracting with the state-created entity. *Id.* at 71.

The Board argues on appeal that the Supreme Court's decision in *Ticor* and ours in *Cine* and *Wheelabrator* stand for the proposition that the active state-supervision test of *Midcal* is applicable only in horizontal price- fixing cases. We disagree. With regard to *Ticor,* the Supreme Court did not limit *Midcal* to any particular form of private anticompetitive conduct, but instead simply cautioned that its holding that the private defendants were not immune "should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision." 504 U.S. at 639, 112 S.Ct. 2169. Four years before *Ticor,* moreover, the Supreme Court, without dissent, applied the active supervision prong in *Patrick,* a case that had nothing to do with price fixing. 486 U.S. at 100, 108 S.Ct. 1658.[10]

We think that *Cine* and *Wheelabrator,* rather than departing from the logic of *Midcal* and subsequent Supreme Court precedent, are consistent with it. We decided in both cases that the governmental entities were authorized to engage in contracting with private parties, establishing that the first prong of *Midcal* was satisfied with regard to the private parties' actions. We then went on to extend that immunity to the private parties, reasoning that to allow suits against private parties who contract with governmental entities, who are themselves authorized to contract with private parties, would effectively undermine the governmental entities' ability to contract. *Wheelabrator,* 155 F.3d at 74; *Cine,* 790 F.2d at 1048. The private parties are the necessary counterparts to the government's acts, and authorization of the government's contracting therefore necessitates authorization of the private parties' contracting.

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[10]While we suggested in *Wheelabrator* that *Ticor* might apply only where private horizontal price fixing is in issue, *Wheelabrator,* 155 F.3d at 74, *Patrick* makes clear that that is not the case, *Patrick,* 486 U.S. at 100, 108 S.Ct. 1658.

In extending immunity from governmental entities to private parties where the only alleged antitrust violation was entering into a contract with the government, these decisions do not go through a separate *Midcal* analysis. But, as the Supreme Court observed in *Town of Hallie*, "[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* ... arrangement." 471 U.S. at 47, 105 S.Ct. 1713. The private actions "in concert" with the governments' in *Cine* and *Wheelabrator* were part of an "anticompetitive scheme [that was] the State's own," *Ticor*, 504 U.S. at 635, 112 S.Ct. 2169, thus satisfying the concern that the second *Midcal* prong--active supervision--was designed to address.

Cine and *Wheelabrator* do not stand for the proposition that private parties who contract with governmental agencies are always immune from antitrust liability. As the Supreme Court has made clear, the relevant object of analysis under the state-action immunity doctrine is the activity challenged, not the identity of the party. *Motor Carriers*, 471 U.S. at 58- 59, 105 S.Ct. 1721 ("The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."). In *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir.2000), which involved an assertion of federal-action immunity from antitrust-law claims by a private party that had contracted with a federal agency, we applied *Motor Carriers* to conclude that the private party was immune for conduct "compelled by the explicit terms" of its contract and the government's explicit direction. *Name.Space*, 202 F.3d at 582. At the same time, however, we observed that the private party's "mere status as a government contractor does not entitle it to antitrust immunity for all its conduct," *id.* at 581, reinforcing the notion that the relevant unit of analysis is the activity challenged, not the status of the party. The suspension of the requirement for an independent immunity inquiry for the private parties in *Cine* and *Wheelabrator*, therefore, should be understood to apply only to their acts of

contracting with an authorized government entity.

B. The Board's Actions

We now consider each of the Board's actions that the plaintiff alleges violate the Sherman Act. We note at the outset that, perhaps with *United States v.Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir.1945) (Hand, J.), and its observation that a person does not violate the antitrust laws when it has monopoly "thrust upon it" in mind, the plaintiff does not assert that the Board violated the Sherman Act merely because the Village passed an ordinance according it exclusivity within the Village. Instead, the plaintiff's claim is that the Board actively sought and abused monopoly power.

We conclude that the district court erred by holding that our decision in *Cine* relieved the Board of the need to satisfy *Midcal's* two-prong test to qualify for state-action immunity. None of the Board's alleged anticompetitive conduct involved acts of contracting with a governmental entity authorized to enter into contracts with private parties. Municipal ordinances, not contracts, created the monopolies within the municipalities at issue in this case. Moreover, when the Board conducts an inspection, or allegedly threatens those who hire the plaintiff, it is engaging in transactions or seeking to engage in transactions with other private parties, not the Village. "[T]he nature of the activity challenged," *Motor Carriers,* 471 U.S. at 58, is private, and therefore poses the danger of reflecting the Board's "own interests, rather than the governmental interests of the State," *Patrick,* 486 U.S. at 101, 108 S.Ct. 1658.

We therefore hold that *Cine* and *Wheelabrator* have no application in this regard to the Board's conduct, and state-action immunity is available for the Board's alleged acts in restraint of trade in violation of Section One of the Sherman Act only if it can satisfy *Midcal's* two-prong test. With respect to the Board's alleged continuing

monopolization of electrical inspection services in violation of Section Two of the Act and the plaintiff's assertion that the Board is left free by the Village to use its power of exclusivity to determine the price, terms, and quality of its services, the Board must meet both parts of the *Midcal* test--including active supervision by the Village--to warrant protection under the state-action immunity doctrine. The Village "may not confer antitrust immunity"--including immunity from such charges of monopolization--" on private persons by fiat." *Ticor,* 504 U.S. at 633, 112 S.Ct. 2169 (citing *Midcal,* 445 U.S. at 105, 100 S.Ct. 937). Unless the Village maintains "ultimate control" over the monopoly it created, "there is a real danger that [the defendant] is acting to further [its] own interests, rather than the governmental interests of the State." *Town of Hallie,* 471 U.S. at 47, 105 S.Ct. 1713.

1. The First Part of the Midcal Test. We concluded in Part II.B., above, that the Village's conferral of exclusivity upon the Board was "an authorized implementation of state policy." *Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344. We think that this holding also satisfies the first prong of the *Midcal* test for the Board to the extent that the Board's alleged anticompetitive actions were "pursuant" to the grant of exclusivity. *Town of Hallie,* 471 U.S. at 40, 105 S.Ct. 1713. The plaintiff's amended complaint alleges anticompetitive actions by the Board in municipalities other than the Village, suggesting that the first prong of the *Midcal* test for purposes of these actions would depend on the authority of these other municipalities to confer monopoly powers upon the Board. On appeal, however, the plaintiff has not raised arguments addressing these municipalities' authority as distinct from the Village's, and so we assume that our analysis of the Village's authority applies equally to these other municipalities for the limited purpose of assessing the Board's satisfaction of the first prong of *Midcal.*

The plaintiff also alleges that the Board attempted to

monopolize inspections services by seeking government-issued exclusivity. Amend. Compl. ¶¶ 55, 84. Because these actions were not *pursuant* to state policy, but rather *in pursuit* of it, they do not appear to qualify for *Parker* immunity. They may, however, be protected under the *Noerr-Pennington* doctrine. *See Omni Outdoor,* 499 U.S. at 379-80, 111 S.Ct. 1344 (holding that the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), establish that "[t]he federal antitrust laws ... do not regulate the conduct of private individuals in seeking anticompetitive action from the government"). We leave any analysis of this issue to the district court in the first instance on remand.

The Board's alleged poor service and retaliatory threats within the Village, if they occurred, unlike the Board's alleged action in lobbying for exclusivity, were *pursuant* to the exclusivity granted to the Board in the sense that the Board's insulation from competition would have lent these actions much of their capacity to harm. We thus conclude that these alleged actions pass the first part of the *Midcal* test.[11] Further inquiry into whether the Board is immune with respect to them must be conducted under the second part of the *Midcal* test: whether there was adequate active supervision of the Board.

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[11]The plaintiff also alleges that the Board has sought to improperly extend use of its monopoly power into localities that have not made it the exclusive provider of inspection services, by threatening customers who use plaintiff's services where they are salable with retaliation in those localities in which the Board has been granted exclusivity. Amend. Compl. ¶¶ 69-72. We leave it to the district court on remand to determine in the first instance whether such actions, if they occurred, were without state-action immunity because they were not reasonably foreseeable anticompetitive effects of the authorized implementation of state policy, or otherwise.

2. The Second Part of the Midcal Test. With respect to the active state supervision part of the *Midcal* test as applied to the Board's remaining alleged anticompetitive conduct, the Board argues in the alternative that adequate supervision was present. In support, the Board cites an affidavit in which the Village's mayor asserts that the Village's building department "maintained strict controls over the inspections" by "establishing policies as to the manner in which the electrical inspections were carried out ... [,] enforc[ing] the requirement that all inspectors ... possess the appropriate qualifications ... [and] provid[ing] guidance to the inspectors as to how to proceed." Mayor Frank Falco Aff. ¶ 11. The mayor also asserts in his affidavit that the Village could have replaced the Board at any time by resolution had it become dissatisfied with the Board's services. *Id.* ¶ 16.

As we have noted, the district court did not determine whether the Board was actively supervised, holding instead that this part of the *Midcal* test need not be met. We decline to decide this heavily factual issue in the first instance on the record before us. We note that in this context that the Village's mere "negative option" to replace the Board at any time is alone likely inadequate supervision, *Ticor,* 504 U.S. at 638 (noting that supervision must be "active"), and leave to the district court on remand the determination in the first instance of what degree or kind of supervision is adequate and suffices for the Board's assertion of immunity to succeed.

IV. The Village's Immunity--Redux

We now return to the question we left unanswered in Part II.C., above: whether the Village's immunity, like the Board's, depends upon a showing that the Board is actively supervised. As we indicated, we are unaware of an opinion of the Supreme Court or of this Court that has squarely addressed this issue. We note that the Supreme Court has never held that a state's failure to supervise a regulated private party can deprive the state of immunity under

Parker, even though such a failure can result in liability for the private party. The federalism-based concerns underlying state immunity from an antitrust action seem to us less pressing in this case than in the immunity cases the Court and we have decided, however, in part because the Village is not a sovereign, and in part because the plaintiff seeks only injunctive and declaratory relief against the Village. An injunction might be an appropriate device for blocking municipal regulatory regimes that result in significant anticompetitive action by private parties and that constitute nothing more than a "gauzy cloak of state involvement." *Midcal*, 445 U.S. at 106.

But the question of the need for an injunction will arise in this case only if the district court ultimately determines that the Board is not actively supervised and thus not immune, and that there has in fact been a violation of the antitrust laws. We therefore decline to decide this issue since it may prove unnecessary to the disposition of the case. If the district court determines on remand that supervision is lacking, that antitrust violations have occurred, and that a damages award against the Board would be inadequate to deter future harms, it may consider for the first time whether the *Parker* antitrust immunity doctrine would allow an injunction to issue against the Village even though the Village's actions were authorized by the state.

V. Caveat

It bears both repetition and emphasis that we have done no more than decide that, on the record before us, the defendants are not entitled to *Parker* state-action immunity as a matter of law. Nothing we have said should be read to imply any views as to the plaintiff's standing under the antitrust laws to raise all of the issues with respect to which it pleads in its amended complaint or as to the possible ultimate merits of its legal claims.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court, and remand the case for further proceedings consistent with this opinion.

145 F.Supp.2d 271
(Cite as: 145 F.Supp.2d 271)

United States District Court
Eastern District of New York

ELECTRICAL INSPECTORS, INC., Plaintiff,

v.

THE NEW YORK BOARD OF FIRE UNDERWRITERS, et al., Defendants.

No. CV 99-1138.

March 30, 2001

WEXLER, J.:

Plaintiff Electrical Inspectors, Inc. ("EII") brings this action against defendants Alexander Pirnie ("Pirnie") and the New York Board of Fire Underwriters (collectively, the "Board"), and the Village of Oyster Bay Cove ("Oyster Bay Cove") and the Village of Islandia ("Islandia") (collectively, the "municipal defendants")[1] asserting, in its amended complaint, claims for violations of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (the "federal antitrust claims"), and New York's Donnelly Act, N.Y. Gen. Bus. Law § 340(1) (the "Donnelly Act claims"), as well as federal claims for violation of due process and equal protection and various supplemental state law claims. In response to the amended complaint, defendants assert, inter alia, that they are shielded from liability under federal antitrust laws by the "state action immunity" doctrine. Before the Court are EII's

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[1]EII also named the Village of East Hills ("East Hills") as a defendant, but the action has since been discontinued as against East Hills.

motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure to strike defendants' state action immunity defenses, and Islandia's and the Board's cross-motions pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing various claims, including the federal antitrust claims. For the reasons below, EII's motion is denied and defendant Board's and Islandia's motions are granted.

I. BACKGROUND

In 1981, the New York State legislature confronted the persistent problem and danger to person and property from fire resulting from the lack of a "single, adequate, enforceable code establishing minimum standards for fire protection" in the construction and maintenance of buildings in the state by enacting the Uniform Fire Prevention and Building Code Act, N.Y. Exec. Law § 370 et. seq. (McKinney 1993) (the "Act"). The Act declared, inter alia, that "it shall be the public policy of the state of New York" to: "[i]mmediately provide for a minimum level of protection from the hazards of fire in every part of the state"; "[p]rovide for the promulgation of a uniform code addressing building construction and fire prevention"; "[i]nsure that the uniform code be in full force and effect in every area of the state"; "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code"; and "[p]rovide for a uniform, statewide approach to the training and qualification of personnel engaged in the administration and enforcement of the uniform code." Id. § 371(2)(a)-(e). The Act prescribed standards for the drafting, by an appointed council, of a "Uniform Fire Prevention and Building Code" (the "Code"). Id. §§ 374-78. The Act also directed the Secretary of State to "promulgate rules and regulations prescribing minimum standards for administration and enforcement of the [Code]." Id. § 381.

Electrical code compliance inspections are used to ensure that electrical work has been done properly, to minimize the

risks associated with malfunctioning, particularly fire. The Act did not specify those persons who would conduct inspections contemplated by the Code. Pursuant to the Act, the Secretary of State promulgated rules and regulations relating to, inter alia, the frequency and adequacy of inspections. For instance, one such regulation, 19 N.Y.C.R.R. § 429.2(b), makes an inspection of electrical wiring a condition precedent to the issuance of a certificate of occupancy. Section 429.2(b) provides that the local legislative body of a city, town, or village may by resolution provide that such inspections be performed by the following: "a designated officer or employee of the city, town or village"; "a designated officer or employee of another city, town, or village who is qualified to conduct such inspections"; "a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village"; "an employee or agent of the county who is qualified to conduct such inspections"; or "a competent inspector, designated or approved by the city, town or village, whose fee shall be paid by the person ... to which the building permit was issued." Id. § 429.2(b)(2)(I)-(v). The regulations further provide that when a municipality "relies upon the contracted for services of an individual, partnership, business corporation or similar firm" for the performance of such inspections, it must satisfy itself as to the qualifications of that firm. Id. § 444.4(a).

According to the parties, municipalities generally require that all electrical wiring be installed in conformity with the "National Electric Code."

EII is a corporation in the business of providing electrical inspections and certificates of compliance with the "National Electric Code" to electricians and residential and commercial property owners. EII provides these electrical services in New York State.

The Board similarly provides electrical inspections and certificates of compliance in New York State. The Board is a not-for-profit corporation created by an act of the New

York State legislature in 1867; the legislature then reconstituted and continued the Board "as a body, corporate and politic, in perpetuity" on April 1, 1930. The Board membership consists of 96 fire insurance companies authorized to write fire insurance policies within the state. Nearly 50% of the Board's revenues are derived from membership dues and assessments paid by the 96 member companies. Pirnie is president of the Board.

Islandia and Oyster Bay Cove are municipalities located in New York, in Nassau County and Suffolk County, respectively. By resolution adopted August 4, 1988, Islandia appointed the Board as its exclusive agent with the right to issue certificates of compliance for electrical work done within its village. EII alleges that Oyster Bay Cove "has and continues to mandate by law or policy that all consumers/residents ... retain the services of the [Board]" as exclusive agent with the right to issue certificates of compliance for electrical work done within its village. Amended Complaint ¶ 23. Thus, while EII may be free to perform electrical inspections in Islandia, Islandia will only issue certificates of occupancy in reliance on the Board's inspections and certificates of compliance. A similar situation allegedly exists in Oyster Bay Cove.[2]

The Board maintains that it charges a uniform rate for its services throughout the state, regardless of whether its services are for a municipality that recognizes the Board as its exclusive agent or for a municipality which authorizes other entities to conduct inspections. According to the Board, it sets its fees annually and disseminates publicly

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[2]In its amended answer to the complaint, Oyster Bay Cove denies that it has any such "law or policy" extending an exclusive franchise to the Board. Oyster Bay Cove's Amended Answer ¶ 1. However, in its papers in opposition to EII's motion, Oyster Bay Cove concedes that "a policy or practice developed" in Oyster Bay Cove "to accept only the certification of the Board as to the proper and legal wiring of all facilities within the ... Village." Defendant Oyster Bay Cove's Memorandum of Law in Opposition, at 3.

throughout the state its annual schedule of fees. The Board maintains that its fees average $50 to $56, which it characterizes as "nominal." Affidavit of Alexander Pirnie, ¶ 17 & n. 1.

EII does not dispute that the Board charges a uniform rate and that the fee schedule is disseminated throughout Nassau and Suffolk Counties, although it disagrees with the Board's characterization of those rates as "nominal." As to the rates, EII asserts that while the Board charges $56 for inspecting a basic service, its minimum charge is $50 and, depending on the circumstances, the "charge on average will range up to $200." Affidavit of Richard Jendzo ¶ 5.

EII further maintains that neither the state nor these municipal defendants supervise the services rendered by the Board or regulate the fees the Board charges to homeowners and electricians. Islandia, however, maintains that it does exercise supervision over inspector, although it does not purport to regulate the Board's fees. In this respect, Frank Falco, Islandia's mayor, asserts that the village's building department "maintained strict controls over the inspections and the inspectors," "established policies as to the manner in which the electrical inspections were carried out," "enforced the requirement that all inspectors assigned by the [Board] possess the appropriate qualifications," and "provided guidance to the inspectors as to how to proceed when confronted with a unique problem presented by a particular installation." Affidavit of Frank B. Falco ¶¶ 11, 17. Mayor Falco further asserts that EII first contacted the village in 1995 seeking to provide inspection services in Islandia. At that time, the village considered and denied EII's request, determining that it would not be in the best interests of the village (and its residents) or building owners to have more than one qualified agency performing services because additional inspectors "would result in loss of control ... over the electrical inspection process and the quality of the end result." Id. ¶ 15. According to Mayor Falco, if the village were dissatisfied with the Board, it could replace the Board

with another qualified agent, such as EII. Id. ¶ 16. In addition, the Board asserts that under the applicable law and regulations, the municipal defendants, not the Board, possess the actual enforcement authority and power to issue or refuse to issue certificates of occupancy, and the duties of these municipalities necessarily include review of the Board's inspection reports prior to approval or denial of a certificate.

EII claims that Islandia's exclusive arrangement with the Board and Oyster Bay Cove's alleged exclusive arrangement with the Board violate, inter alia, federal antitrust laws. EII asserts that these municipalities must also recognize EII as a qualified inspector. Defendants have asserted, as affirmative defenses, that state action immunity shields them from liability under federal antitrust laws. EII moves to strike those defenses, and Islandia and the Board cross-move for summary judgment dismissing the federal antitrust claims based on state action immunity and dismissing the Donnelly Act claim and other claims. Oyster Bay Cove opposes EII's motion to strike its state action immunity defense and argues that under the circumstances alleged the defense is sufficient as a matter of law.

II. DISCUSSION

On a motion under Rule 12(f), the court may strike from a pleading any "insufficient" defense. Fed.R.Civ.P. 12(f). A motion to strike an affirmative defense is decided on the basis of the pleadings alone. *National Union Fire Ins. Co. v. Alexander*, 728 F.Supp. 192, 203 (S.D.N.Y.1989). Affirmative defenses are subject to the general rules of pleading; consequently, a party "shall state in short and plain terms the party's defenses." Fed.R.Civ.P. 8(b); *D.S. Am. (East), Inc. v. Chromagrafx Imaging Sys., Inc.*, 873 F.Supp. 786, 797 (E.D.N.Y.1995). "An affirmative defense is legally 'insufficient' if, as a matter of law, it cannot succeed under any circumstances." *D.S. Am. (East), Inc.*, 873 F.Supp. at 798.

A party seeking summary judgment must demonstrate that "there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The nonmoving party may defeat the summary judgment motion by producing sufficient evidence to establish a genuine issue of material fact for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In ruling on a motion for summary judgment, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. See *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir.1987). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Guided by these principles, this Court addresses the sufficiency of the state action immunity defenses, assuming for purposes of discussion the sufficiency of the federal antitrust claims.

A. The Municipal Defendants

Each of the municipal defendants, Oyster Bay Cove and Islandia, argues, inter alia, that the act or alleged act of appointing the Board as exclusive agent with the right to issue certificates of compliance for electrical work done within its village is immune from federal antitrust laws under the "state action immunity" doctrine, which originated in *Parker v. Brown*, 317 U.S. 341, 351-52, 63 S.Ct. 307, 87 L.Ed. 315 (1943). When a state acts in its sovereign capacity, its actions are immune from federal antitrust laws. Id. As state subdivisions, however, municipalities do not enjoy the same deference due a state as sovereign. Rather, a municipality will be immune from federal antitrust laws only if it acts "as an instrumentality of the state, through which the state has clearly and affirmatively chosen to

implement its policies." *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1042 (2d Cir.1986) (citing *Community Comms. Co. v. City of Boulder*, 455 U.S. 40, 52-54, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411-13, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)). Thus, when a municipality asserts state action immunity, it must identify a "clearly expressed state policy" that authorizes its anticompetitive actions. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). "The legislation must contain an affirmative showing of intent, though it need do no more than authorize the challenged conduct." *Cine*, 790 F.2d at 1042. As the Second Circuit has recognized, "the 'clear articulation' label is not quite the hurdle that its language suggests, because it has always been synonymous with the foreseeability test." *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 69 (2d Cir.1998). In other words, if the "resulting anticompetitive activities are a foreseeable consequence of the state delegation, the 'clear articulation' standard has been met." Cine, 790 F.2d at 1042. "To meet this requirement the party claiming the state action defense must show that the 'legislature contemplated the action complained of.' " Id. (quoting *Hallie*, 471 U.S. at 44, 105 S.Ct. 1713, in turn quoting *Lafayette*, 435 U.S. at 415, 98 S.Ct. 1123). The Second Circuit in Cine summarized "the rule defining the scope of the delegation" as follows:

> [W]e conclude that the enabling legislation need not explicitly authorize the exact actions undertaken. It is only necessary that the permitted actions produce anticompetitive consequences that foreseeably flow from the grant of state authority. That is, the enabling statute must affirmatively designate a particular area to be regulated, provide the methods of regulation, and create grounds for a reasoned belief that some anticompetitive activity could be envisioned.

Id. at 1043-44.

A review of the Act supports the municipal defendants' argument that the appointment of an exclusive agent is a "foreseeable" consequence of the state delegation of authority to administer and enforce a uniform code. In this respect, the Act declares that it is "the public policy of the state of New York" to, inter alia, "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." N.Y. Exec. Law § 371(2)(d) (McKinney 1993) (emphasis added). The Act mandates the uniform and active enforcement, by municipalities, of the contemplated uniform code. The Act designates a discrete area to be regulated, i.e., fire prevention and building construction, an area integral to public health and safety. The Act contemplates the inspection of electrical work to be performed within the limited geographic area of each municipality, and provides a method of regulation, namely, by municipalities exercising their "full powers" to administer and enforce a governing uniform code. Electrical inspections are an integral aspect of municipal building inspections, the regulation of which clearly falls within a municipality's police power. Given this broad delegation of authority over a matter integral to public health and safety, it is foreseeable that a municipality would, though it need not, displace competition in administering and enforcing its own electrical inspection program within its limited geographic area by appointing an exclusive agent. Indeed, the regulations promulgated pursuant to the Act recognize that a municipality may conduct such inspections through its own employees or through a designated agent. Thus, contrary to EII's arguments, it is foreseeable that a municipality would, though it need not, designate an exclusive agent, with or without competitive bidding.

EII argues that because the Board is a private party the municipal defendants are not entitled to state action immunity unless they show "active state supervision." Memorandum of Law in Support of Plaintiff's Motion to

Dismiss Certain Affirmative Defenses of All Defendants, at 4-5. To the extent EII suggests that the municipal defendants must show that the state actively supervised their anticompetitive conduct, there is no such requirement. As the Second Circuit held in Cine: "When the actor is a municipality, the active state supervision requirement is abandoned because a municipality has no incentive to act in other than the public interest." *Cine*, 790 F.2d at 1047. To the extent EII argues that the municipal defendants are not entitled to state action immunity unless they can plead and prove that they maintained "active governmental supervision of the prices or the services rendered by [the Board]," Memorandum of Law in Reply on the Motion and in Opposition to the Defendants' Cross-Motion for Summary Judgment ("Plaintiff's Reply Mem."), at 6, that argument is unavailing under the circumstances alleged by EII. The effective municipal decisions that EII alleges caused injury to EII are the municipal defendants' appointments of the Board as exclusive agent, not the alleged unsupervised Board conduct or alleged unsupervised Board fee-setting. The municipal defendants' decisions to appoint the Board as exclusive agent are immune from attack by EII under the federal antitrust laws by the state action immunity doctrine.

Accordingly, Oyster Bay Cove and Islandia are entitled to state action immunity from EII's federal antitrust claims.

B. The Private Party Defendants

As for the Board's assertion of state action immunity, EIIinitially argues that the Board is barred by collateral estoppel from asserting that defense to EII's federal antitrust claims based on the decision in *Atlantic- Inland, Inc. v. Town of Union*, 126 Misc.2d 509, 483 N.Y.S.2d 612 (Sup.Ct., Broome County 1984). This Court disagrees. In Atlantic-Inland, the court struck down a Town of Union ordinance appointing the Board as exclusive agent to conduct electrical inspections and issue certificates of compliance as violating the state constitution and the Donnelly Act. *Id.*,

483 N.Y.S.2d at 618-19. Although the Board was an intervenor in that action, that action did not involve the same factual or legal issues raised here. Indeed, the court did not address the issue of state action immunity to a federal antitrust claim, and the municipal defendants here were not parties to that action nor were their appointments of the Board as exclusive agent at issue there. Accordingly, collateral estoppel is not a bar to the Board's assertion of state action immunity based on the alleged appointments by Oyster Bay Cove and Islandia.

EII further argues that the Board is not entitled to state action immunity because the Board cannot show "active governmental supervision of the prices or the services rendered by [the Board]." Plaintiff's Reply Mem. at 6. However, a showing of active "governmental" supervision is not required as to the challenged municipal decisions. The effective decision that EII claims caused it injury are the municipal defendants' decisions appointing the Board as exclusive agent. Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments. *See Cine,* 790 F.2d at 1048; *Zimomra v. Alamo Rent-A-Car, Inc.,* 111 F.3d 1495, 1500 (10th Cir.1997); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.,* 810 F.2d 869, 878 (9th Cir.1987); *Bloom v. Hennepin County,* 783 F.Supp. 418, 426-27 (D.Minn.1992); *City Comms., Inc. v. City of Detroit,* 660 F.Supp. 932, 933-35 (E.D.Mich.1987). To allow such a tangential attack on the decision to appoint the Board would effectively block a municipal defendant's efforts to comply with the articulated state policy. *See Cine,* 790 F.2d at 1048.

Accordingly, the Board is entitled to state action

immunity from EII's federal antitrust claims.[3]

III. CONCLUSION

Because defendants are entitled to state action immunity, EII's motion to strike is denied and the Board's and Islandia's motions for summary judgment on the federal antitrust claims are granted. However, before addressing any of EII's supplemental state claims, the parties are directed to address the viability of the remaining federal claims (i.e., due process and equal protection claims). The Court will schedule a conference to address any further briefing.

SO ORDERED.

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[3]Pirnie and the Board also argue that they are entitled to immunity from EII's federal antitrust claims under the "Noerr-Pennington doctrine" established by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Based on this Court's determination that the Board is protected by state action immunity, it need not address the applicability of the Noerr-Pennington doctrine.

United States Court of Appeals, Second Circuit

ELECTRICAL INSPECTORS, INC.,

Plaintiff-Counter-Defendant-Appellant,

- v. -

VILLAGE OF EAST HILLS, Village of Roslyn and Village of Oyster Bay Cove,

Defendants-Counter-Claimants,

Village of Islandia, Alexander Pirnie and New York Board of Fire Underwriters,

Defendants-Counter-Claimants-Appellees,

Village of Island Park, Village of Brookville, Village of North Hills, Village

of Flower Hill, Village of Great Neck, Village of Great Neck Estates, Village

of Kings Point, Village of Port Washington North, Village of Sea Cliff, Village

of Saddle Rock and Village of Baiting Hollow, Defendants.

Docket No. 01-9483

Argued: June 17, 2002

Decided: December 13, 2002

Before: CALABRESI, SACK, and B.D. PARKER, Circuit Judges.

SACK, Circuit Judge:

This appeal requires us to determine whether the state-action immunity doctrine shields a municipality and a private corporation from alleged federal antitrust-law

violations resulting from the municipality's conferral upon the corporation of exclusivity in the market for government-required electrical inspection services within the municipality.

The defendant Village of Islandia (the "Village") is a municipality located on New York's Long Island. In 1988, the Village adopted a policy of requiring building owners to obtain certificates of occupancy from the Village, and conditioning the issuance of such certificates on the positive results of an electrical wiring inspection conducted by the not-for-profit defendant New York Board of Fire Underwriters (the "Board"). Any property owner who wishes to use or occupy a building is required to submit to and pay the Board for the Board's inspection. The plaintiff, a for-profit corporation that also provides electrical inspection services in the State of New York, brought suit against both the Village and the Board in the United States District Court for the Eastern District of New York alleging that this arrangement resulted in violations of the Sherman Act and other federal and state laws. The district court (Leonard D. Wexler, Judge) concluded that the Village's policy was authorized by an act of the New York State Legislature, and that the actions of the Village and the Board were therefore exempt from the federal antitrust laws under the state- action immunity doctrine. *Elec. Inspectors, Inc. v. N.Y. Bd. of Fire Underwriters*, 145 F. Supp. 2d 271, 279 (E.D.N.Y. 2001) ("EII").

We agree with the district court that for purposes of the state-action immunity doctrine, the state authorized the Village to pass the ordinance that gave the Board exclusivity with respect to the performance of wiring inspections in Islandia. We disagree, however, with the district court's holding that this finding is sufficient in itself to support a dismissal of the plaintiff's federal antitrust-law claims. We conclude that such immunity for the Board against the plaintiff's claim for damages, and possibly for the Village against the plaintiff's claim for equitable relief, requires a

finding that government officials actively supervised the Board. We therefore vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

In 1981, the New York State Legislature enacted the Uniform Fire Prevention and Building Code Act (the "Act"), N.Y. Exec. Law § 370 *et seq*. The Act required the creation of a state-wide uniform fire code for commercial and residential buildings, *id.* § 377, and it directed New York's various local governments to "dminister and enforce the uniform . . . code," *id.* § 381(2). To facilitate local governments' carrying out of their enforcement responsibilities, the Act directed the New York Secretary of State to "promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform . . . code," *id.* § 381(1), and gave the Secretary powers to ensure that local governments enforced the code in compliance with the Secretary's regulations, *id.* § 381(4). The Act required the regulations issued by the Secretary to address, *inter alia*, the frequency of building inspections and the number and quality of inspectors. *Id.*§ 381(1).

Pursuant to the Act, the Secretary issued regulations providing that any property owner who wishes to use or occupy a commercial or residential building must obtain a certificate of occupancy from a local government body. N.Y. Comp. Codes R. & Regs. tit. 19, § 429(c)(1) (repealed 1996). Local governments, in turn, were forbidden from issuing a certificate of occupancy for any building unless a designated officer or agent inspected the building's electrical wiring and certified that it complied with the uniform electrical code. *Id.* § 429(b)(1) (repealed 1996). Finally, the Secretary's regulations (later withdrawn) authorized local governments to pass resolutions designating those who would conduct such inspections. The specified options were (1) "a designated officer or employee of the city, town, or village"; (2) "an employee or agent of another city, town, or

village who is qualified to conduct such inspections"; (3) "a person who is qualified to conduct such inspections . . . pursuant to a contract with the city, town, or village"; (4) "an employee or agent of the county who is qualified to conduct such inspection"; and (5) "a competent inspector, designated or approved by the city, town, or village." *Id.* § 429.2(b)(2)(i)-(iv) (repealed 1996).

Pursuant to those regulations and prior to their repeal, on August 4, 1988, the trustees of the Village passed an ordinance resolving that the Village "accepts [the Board] as its only electrical inspecting agency." Thereafter, the Village required all applicants for certificates of occupancy to present proof that the Board had inspected the electrical wiring in their buildings and certified that it complied with the National Electric Code.[1]

The Board is a not-for-profit corporation that received its charter from the New York State Legislature in 1867.[2] Its members are ninety- six insurance companies authorized to write fire insurance policies in New York. According to an affidavit submitted by defendant Alexander Pirnie, the Board's former president,[3] the Board engages in two principal activities: It maintains the New York City Fire Patrol, a group of patrolmen who assist New York City's firefighters, and it inspects electrical equipment and issues

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[1]The National Electric Code is "a model code promulgated by the National Fire Protection Association," *Edison Elec. Inst. v. Occupational Safety & Health Admin.*, 849 F.2d 611, 614 (D.C. Cir. 1988), which is "an international nonprofit membership organization," *see* NFPA Overview, at http://www.nfpa.org/Home/ AboutNFPA/NFPAOverview/ NFPAOverview.asp (last visited December 12, 2002).

[2]On April 1, 1930, the New York State Legislature reconstituted and continued the Board "as a body, corporate and politic, in perpetuity."

[3] The distinction between the Board and Pirnie is not relevant for purposes of this appeal, and our legal conclusions regarding the Board apply equally to Pirnie.

certificates of compliance with the National Electric Code. Pirnie Aff. ¶¶ 4, 11. Approximately 250 New York municipalities have adopted policies that, like the Village's, effectively require building owners to obtain certificates of compliance from the Board. *Id.* ¶ 12. The Board charges a fee for inspections to be paid by the property owner.

The plaintiff, Electrical Inspectors, Inc., is a for-profit corporation that, like the Board, inspects electrical wiring in commercial and residential properties in New York State and issues certificates of compliance with the National Electric Code. On March 1, 1999, the plaintiff brought this action in the district court against fifteen New York municipalities including the Village; on September 9, 1999, it amended its complaint to name the Board as a defendant. The plaintiff alleged various violations of the Sherman Act, 15 U.S.C. §§ 1 & 2, the Donnelly Act, N.Y. Gen. Bus. Law § 340(1), its federal due process rights, and its federal and state equal protection rights. According to the amended complaint, the municipalities' policies of conferring monopoly power within their respective boundaries on the Board were unauthorized by state law and had the illegal effect of excluding the plaintiff from local markets for electrical inspection services. Amend. Compl. ¶ 139. The plaintiff also alleged that the Board actively sought and maintained such grants, and abused its exclusive positions by providing low-quality service and by seeking to expand its overall market share by threatening to retaliate in those locations where it has exclusivity against customers who use the plaintiff's services where competition is allowed. *Id.* ¶¶ 52, 69, 72, 112, 118.[4] The plaintiff sought monetary damages against the Board, and injunctive and declaratory relief against the municipalities, for their asserted violation of the federal antitrust laws.

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[4] The plaintiff also challenged the legitimacy of the Board's status as a non-profit entity, alleging that the Board's exemption from income taxes enabled it to earn "excess profits" that accrued to the benefit of its for-profit members. Amend. Compl. ¶¶ 45, 113.

The defendants assert in their answer, *inter alia*, that they are immune from the plaintiff's federal antitrust-law claims under the state-action doctrine. The plaintiff moved to strike this defense as insufficient pursuant to Federal Rule of Civil Procedure 12(f), and the defendants cross-moved for summary judgment on the federal antitrust law claims.

On March 30, 2001, the district court issued a Memorandum and Order denying the plaintiff's motion to strike and granting the defendants' motion for summary judgment. EII, 145 F. Supp. 2d at 279. The court held that the municipalities were immune from federal antitrust liability on the grounds that the Act gave them "broad . . . authority over a matter integral to public health and safety," and that appointing exclusive agents to conduct required electrical inspections was "a 'foreseeable' consequence of the state delegation of authority." *Id.* at 277-78. The district court then concluded that the municipalities' immunity under the state-action doctrine extended to the Board. "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *Id.* at 279 (citing *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986)).

On September 21, 2001, the plaintiff voluntarily dismissed its federal constitutional claims against the municipal defendants. The district court subsequently issued a judgment dismissing with prejudice the plaintiff's federal antitrust-law claims, and dismissing without prejudice the plaintiff's state-law claims for want of supplemental jurisdiction. The plaintiff now appeals, challenging only the district court's dismissal of its federal antitrust-law claims against the Board and the Village.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999), cert. denied, 529 U.S. 1098 (2000). A district court must grant a motion for summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

II. State-Action Immunity for the Village

The Village regulates the usage of local real estate by requiring all owners of commercial and residential buildings who wish to use or occupy their property to obtain from the Village a certificate of occupancy. In order to do so, for reasons of fire safety, a property owner must, under the Village ordinance, first submit the property to an electrical wiring inspection by the Board, pay the Board's fee, and receive from the Board certification that the wiring complies with the National Electric Code. The plaintiff alleged in its amended complaint that the Village's conferral of such exclusivity on the Board violates, *inter alia*, the Sherman

Act, and sought injunctive and declaratory relief.[5] The Village asserts the affirmative defense that its action was pursuant to state policy and thus was exempt from the federal antitrust laws under the state-action immunity doctrine. The district court agreed with the Village. The plaintiff challenges this holding on appeal.

Because the district court granted judgment to the Village on its affirmative defense, neither the standing of the plaintiff under the antitrust laws to make all of the underlying claims it asserts nor the merits of the claims are at issue in this appeal. Our only task with regard to the plaintiff's claims against the Village is to evaluate the district court's conclusion that the Village is immune.

A. Immunity for Municipal Economic Regulation

In *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) ("*Omni Outdoor*"), the Supreme Court addressed state-action immunity for municipal regulatory schemes. There, the City of Columbia, South Carolina, asserted immunity from a claim under the Sherman Act that its restrictions on the size, location, and spacing of billboards hindered the ability of newcomers to compete in the billboard construction market. *Id.* at 367-69. The Court began its analysis by noting that under the state-action immunity doctrine established by its decision in *Parker v. Brown*, 317 U.S. 341 (1943), "the Sherman Act [does] not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *Omni Outdoor*, 499 U.S. at 370

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[5]The plaintiff does not allege that the Village has created a monopoly in the sense that it forbade property owners from hiring the plaintiff. The plaintiff's allegation is, rather, that the Village's requirement that every owner submit a Board-issued certificate of compliance in order to receive a certificate of occupancy effectively eliminated demand for the plaintiff's services. The implicit assumption, which we have no reason to doubt, is that property owners have little need for additional inspection services once they have obtained a certificate of occupancy.

(quoting *Parker*, 317 U.S. at 352). The Court explained that the doctrine is grounded in "principles of federalism and state sovereignty." *Omni Outdoor*, 499 U.S. at 370. Local governments are not sovereign, and so their actions are not automatically immune under *Parker*. *Omni Outdoor*, 499 U.S. at 370. Nonetheless, because states sometimes effect regulatory regimes through local government bodies, municipalities may avail themselves of *Parker* immunity to the extent their actions are "an authorized implementation of state policy." *Id.*

The Court held that municipalities that wish to avail themselves of *Parker* immunity must show that their regulations were authorized by the state. The requisite showing of authority has two components: First, the municipality must have "authority to regulate"; second, it must have "authority to suppress competition." *Id.* at 372; accord *Hertz Corp. v. City of New York*, 1 F.3d 121, 128 (2d Cir. 1993) (holding that under *Parker* a municipality must establish that "the resulting anticompetitive activities are a foreseeable consequence of [a] state delegation" (quoting *Cine 42nd St. Theater Corp. v. Nederlander Org.*, Inc., 790 F.2d 1032, 1043 (2d Cir. 1986) ("*Cine*"))), cert. denied, 510 U.S. 1111 (1994).

To determine whether the City of Columbia had "authority to regulate," the Supreme Court looked to the terms of the relevant South Carolina statutes. *Omni Outdoor*, 499 U.S. at 371. At the same time, the Court held that federal courts, when determining state-action immunity for municipalities, must "adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." Id. at 372. This broader concept of authority is necessary, the Court explained, because a doctrine of state-action immunity that "transform[ed] state administrative review into a federal antitrust job" would undermine "the very interests of federalism [the *Parker* doctrine] is designed to protect." Id. at 372 (citation omitted). For this reason, the Court held,

the inquiry into a municipality's authority to regulate should not be exacting. Id. at 371. The Court went on to decide that language in the South Carolina statute authorizing local governments to regulate the height and size of "structures" constituted sufficient authority for the City of Columbia's billboard regulations. Id. at 372-73 & n.4. Although the statute also provided that municipal ordinances were valid only if they served "the purpose of promoting health, safety, morals or the general welfare of the community," the Court declined to inquire whether the city's ordinance fulfilled this requirement. Id. at 370 n.3, 371-73 (citation and internal quotation marks omitted). The Court's decision not to inquire as to whether Columbia's ordinance was actually authorized by state statute suggests that as long as the local enactment is within a broad view of the authority granted by the state, whether it is actually violative of that statute is a question for state authorities, not one of federal antitrust law.

With regard to the second component of the inquiry, i.e., whether the City of Columbia had "authority to suppress competition," the Supreme Court began by "reject[ing] the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition." *Id.* at 372. Instead, the Court held, the requirement is met "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id.* quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)). The Court then asked whether a logical relationship existed between the purpose of the state statute and its alleged anticompetitive effect, and observed that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni Outdoor*, 499 U.S. at 373. On this basis, the Court concluded that suppression of competition was a foreseeable result of the South Carolina statute, and thus that the City of Columbia

had met the requirements for immunity for its regulatory scheme. Id. at 374.

The Supreme Court's analysis in *Omni Outdoor* mirrored the approach that this Court had followed in *Cine*. There we examined the actions of the New York "Urban Development Corporation," or "UDC," a public entity designed by the New York State Legislature "to make the State an active participant in the financing and construction of urban renewal projects." *Cine*, 790 F.2d at 1036. The UDC purchased theaters in the Times Square area of New York City and then awarded leases on them to private developers, prompting parties whose applications for leases had been rejected to bring suit under the Sherman Act against both the UDC and the winning bidders. *Id.* at 1037-38. The defendants claimed state-action immunity. *Id.* at 1038.

We began our analysis by holding that because the UDC was a "political subdivision of the state," it was like a municipality for purposes of the *Parker* doctrine. *Cine*, 790 F.2d at 1047. We then concluded that in order to qualify for state-action immunity, the UDC was required to "show [1] that it acted pursuant to a clearly expressed state policy and [2] that the resulting antitrust consequences were reasonably contemplated by the state." *Id.* at 1047-48.

With regard to the first component, we found authority for the UDC's actions in language in the UDC's enabling statute that specifically empowered it to purchase, and issue leases on, real property. *Id.* at 1045. Under the second component, we concluded that harm to some businesses around Times Square was a foreseeable consequence of the creation of an entity whose purpose was to improve a blighted urban area:

> It is fair to conclude that the legislature contemplated that when it granted power to the UDC to determine what buildings and services would be

> provided in a particular redeveloped land use project, it knew those choices would affect businesses and residences in that entire area. Such a conclusion is based on common sense. As a result of cultural improvements, rents and property values would increase even though some competitors would be adversely impacted, and some would disappear.

Id. at 1047. On this basis, we held that the UDC had shown sufficient state authority for its actions, and thus was immune under the *Parker* state-action immunity doctrine.

B. The New York Act and the Village Ordinance

The Village argues that its actions effectively excluding the plaintiff from the market for electrical inspections within its boundaries were authorized by the Act and related regulations issued by the New York Secretary of State. To evaluate the Village's defense, we follow the two-step inquiry set forth and applied in *Omni Outdoor* and *Cine*.

1. Step One: Authority to Regulate. The Village cites two provisions of the Act for its authority to regulate: § 381, which provides that "every local government shall administer and enforce the uniform fire prevention and building code"; and § 371, which states that "it shall be the public policy of the state of New York" to "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." N.Y. Exec. Law §§ 381(2), 371(2)(d). The Village also cites for support the regulations issued pursuant to the Act by New York's Secretary of State.

The plaintiff disagrees that the Act confers any new powers on New York municipalities that they do not already have, and argues that the statutory language cited by the Village merely directs local governments to apply to a particular purpose powers arising from other statutory

sources. If the plaintiff's interpretation of the Act is correct, then the state-action immunity defense is unavailable because the Village has not identified any other specific statutory source of regulatory power, and the principle is well established that a municipality may not fall back on its general police or "home-rule" powers to immunize anticompetitive regulations. *See Cmty. Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982); Hertz, 1 F.3d at 128.

If the Village had only the language of the Act to rely upon, its authority for purposes of the *Parker* doctrine might be subject to doubt. The cited provisions can be read as no more than a direction to New York State municipalities as to how to act, in contrast with statutory language relied on by municipalities in cases in which they have been held to be immune where a similar direction was coupled with an explicit conferral of regulatory power. *See Omni Outdoor*, 499 U.S. at 370-71 n.3 (South Carolina statute providing that "the legislative bod[ies] of cities and incorporated towns may by ordinance regulate . . . buildings and other structures"); *Cine*, 790 F.2d at 1045 (New York statute empowering the UDC "to acquire . . . real, personal or mixed property[,] and to sell . . . [or] lease . . . the same").

We conclude, however, that the regulations issued by the Secretary soon after the passage of the state statute make clear that even if the Village's ordinance was not actually authorized by the state statute itself, it was within the broad grant of state authority. The Secretary's regulations authorized municipalities to condition occupation and use of a building on the result of an electrical inspection, and "by resolution provide that such inspection shall be performed by [an] inspector, designated or approved by the . . . town." N.Y. Comp. Codes R. & Regs. tit. 19, § 429(b) (repealed 1996). The regulations appeared to interpret the statute to authorize the Village, or at least to authorize the Secretary to authorize the Village, to do precisely that which the

Village has done.[6]

We think that the Act, combined with the Secretary's apparent interpretation of it, sufficiently demonstrates the Village's broad "authority to regulate" for purposes of state-action immunity. The Village has cited statutory language that, although perhaps ambiguous on the question, can be interpreted as delegating a power to regulate, and it has cited regulations issued by the agency charged with enforcing the statute that confer a power to regulate in plain language. Even though those regulations were subsequently withdrawn, they establish the Village's contention that its action was within the broad authority to regulate granted by the state statute itself. Under the broad concept of authority that principles of federalism compel us to apply, we conclude that these sources are sufficient for purposes of *Parker* state-action immunity analysis.

2. Step Two: Authority to Suppress Competition. We also conclude that the Act and the Secretary's regulations establish the second component of authority that municipalities must show under *Parker*. The specific anticompetitive harm that the plaintiff alleges results from the Village's actions is the plaintiff's complete exclusion from the market for required electrical inspection services. We think that such exclusion is a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations that condition the issuance of certificates of occupancy upon inspections by town-designated agents. "[C]ommon sense," *Cine*, 790 F.2d at 1047, indicates that a municipality in the course of enforcing

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[6]While, under the principles announced *Omni Outdoor*, it is not for us as a federal court of appeals to decide on this appeal whether the Village's acts are ultra vires, neither do we decide that had a state court determined that the acts were ultra vires, we would nonetheless conclude that the municipality or the private actor was entitled to state- action immunity.

a fire code is likely, for quality control purposes, to limit the set of persons who may issue certificates of compliance, "even though some competitors would be adversely impacted," id. And common experience indicates that municipalities often use their own employees to enforce a variety of public codes, such as food preparation or building codes, thereby effectively conferring upon themselves exclusivity in the market for required inspection services at a cost to private entities that would perform the same services. The Secretary specifically authorized such town-operated monopolies. N.Y. Comp. R. & Regs. tit. 19, § 429.2(b)(I) (repealed 1996). Such a regime also appears to be contemplated by the section of the Act that provides that "[l]ocal governments or counties may charge fees to defray the costs of administration and enforcement," N.Y. Exec. Law § 381(2). Thus, complete exclusion of a potential competitor in the market was foreseeable.

The plaintiff argues that even if a town-operated monopoly was foreseeable, the designation of a private party as the party enjoying exclusivity was not. We think, however, that the plaintiff's argument misunderstands the nature of the foreseeability inquiry. Our task in assessing the second component of authority identified in *Omni Outdoor* is to determine whether the state intended or at least could have contemplated that its policy would result in "suppression of competition." 499 U.S. at 373; accord *Cine*, 790 F.2d at 1047. Whom the municipality selected as the party exercising exclusivity is at best tangential to the inquiry into the foreseeability of suppression of competition. By definition, the creation of a monopoly suppresses -- indeed eliminates -- all competition in that locality, and in this sense the degree of suppression is the same whether the party exercising the power arising out of exclusivity is public or private. The foreseeability inquiry requires us to go no further. *See Cine*, 790 F.2d at 1045-46 (identifying the relevant question as whether the UDC's entry into leases with private parties was foreseeable, and not inquiring into

the foreseeability of its selection of any party in particular). We therefore conclude that the suppression of competition resulting from the Village's actions was a foreseeable consequence of what the state authorized.

C. The Supervision Issue with Regard to the Village

Before we can decide whether the Village is immune from the plaintiff's claims, however, we must confront yet one more issue. The plaintiff argues that for a municipality to be immune under the *Parker* state-action immunity doctrine, it must show, in addition to state authority for its regulatory scheme, that government officials actively supervise those private parties whom the municipality regulates.

Whether a municipality must make such a showing appears to be an open question. The Supreme Court held in *Town of Hallie* that a municipality need not show that it is supervised by state officials for it to qualify for state-action immunity. 471 U.S. at 46. But the Supreme Court also indicated that "[w]here state or municipal regulation by a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." Id. at 46 n.10. This raises the question of whether a failure to show active supervision of a private party can defeat both the municipality's claim of immunity and the private party's, or only the private party's. We are not aware of any decision that squarely addresses this issue.

The law regarding the active supervision requirement has developed almost entirely in the context of claims against private parties. We will therefore return to the question of whether the Village's immunity might depend upon a showing that the Board is actively supervised by the Village after we review the plaintiff's claims against the Board.

III. The Board's State-Action Immunity Defense

The plaintiff alleged in its amended complaint that the Board violated the Sherman Act by willfully seeking and maintaining monopolies in various New York municipalities, and by abusing its monopoly power by providing low- quality service and by attempting to expand its overall market share by threatening retaliatory action against those persons who use the plaintiff's service where competition is allowed. The district court, citing our decision in *Cine*, held that the municipalities' immunity under the *Parker* doctrine necessarily also protected the Board: "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." EII, 145 F. Supp. 2d at 279. The plaintiff argues on appeal that the district court misapplied the law of state-action immunity for private parties.[7]. The Board argues that the district court's holding

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[7]The plaintiff also argues that the decision of New York Supreme Court, Broome County, in *Atlantic-Inland*, 126 Misc. 2d at 516, 483 N.Y.S. 2d at 618, collaterally estops the Board from asserting a state- action immunity defense in this case. The fact pattern of *Atlantic-Inland* was similar to that of the instant case: An electrical inspection firm, alleging violations of its constitutional rights and New York antitrust law (i.e., the Donnelly Act), sued a municipality that had designated the Board its exclusive provider of required electrical inspections. The Board intervened on the side of the municipality. The court entered judgment against the defendants, holding that "the [municipality's] ordinance is anticompetitive and an unwarranted monopoly in violation of the Donnelly Act." *Id.* at 517, 483 N.Y.S.2d at 618. Although the court's opinion in *Atlantic-Inland* does not mention the state-action immunity defense, the plaintiff argues that the Board could have raised the defense in that case, and so its defeat precludes it from raising the defense now. The plaintiff's collateral estoppel argument fails as a matter of law. Unlike the federal antitrust laws, the Donnelly Act contemplates no state- action exception. *Elec. Inspectors, Inc. v. Village of Lynbrook*, 293 A.D.2d 537, 538, 740 N.Y.S.2d 412, 413 (2d Dep't 2002). Thus, even if the Board raised state-action immunity in *Atlantic-Inland*, rejection of that defense was not necessary

was correct, and in the alternative that under the *Noerr-Pennington* doctrine, certain allegations by the plaintiff fail to allege an antitrust injury.[8]

A. The State-Action Defense for Private Actors

There are circumstances under which private parties may avail themselves of the *Parker* state-action immunity doctrine. The Supreme Court has explained the purpose of extending state-action immunity to private parties thus:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that [the plaintiff] sued the wrong parties.

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to the disposition, and so that case does not preclude the Board from raising the defense here. *See Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 109 (2d Cir. 2002) (collateral estoppel applies only to issues necessarily resolved in previous proceeding).

[8]In a supplemental brief that we requested at oral argument, the Board asserted for the first time a defense under the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 et seq.. Because the Board did not raise the defense in its principal appellate brief, the Board has abandoned the defense and we do not consider it. *See*, e.g., *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999).

S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 56-57 (1985) (footnote omitted) ("*Motor Carriers*").

In *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the Supreme Court established that private parties must satisfy a two-prong test to qualify for state-action immunity. First, the private party must show that the alleged anticompetitive acts were pursuant to a "clearly articulated and affirmatively expressed . . . state policy" to displace competition. *Id.* (citation and internal quotation marks omitted). Second, it must show that its conduct was "actively supervised by the ate itself." *Id.* (citation and internal quotation marks omitted).

More recently, the Supreme Court made clear that the first prong of the *Midcal* test is not as demanding as the Court's statement of it in *Midcal* suggests. It does not, for example, require a private party to show "'a specific, detailed legislative authorization' for its challenged conduct." *Motor Carriers*, 471 U.S. at 64 (quoting *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978)). Rather, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Motor Carriers*, 471 U.S. at 64. For example, in *Motor Carriers* itself, the Court held that a private party accused of horizontal price fixing had satisfied the first prong of *Midcal* by showing that a state legislature had instructed a state agency to prescribe "just and reasonable" prices, and the agency, in turn, had "exercised its discretion by actively encouraging collective ratemaking." *Id.* at 63-64.

Under the second prong of the *Midcal* test -- active state supervision -- a private defendant must show not only that "state officials have . . . [the] power" to supervise, but also that those officials "exercise [that] power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."

Patrick v. Burget, 486 U.S. 94, 101 (1988). This requirement of official involvement seeks to prevent states from transforming the *Parker* doctrine, designed to accommodate the states' sovereign interest in regulating commerce, into an unbounded license for the states to issue Sherman Act exemptions to private parties. *See Motor Carriers*, 471 U.S. at 57 ("Th[e] supervision requirement prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." (quoting *Midcal*, 445 U.S. at 106)); *Parker*, 317 U.S. at 351 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). This second part of the *Midcal* test thus serves as a counterweight to the first because it "ensure[s] that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick*, 486 U.S. at 100-01.[9]

The Supreme Court's most recent decision applying the active supervision prong is *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). There, the Court held that arrangements whereby states authorized horizontal price fixing among insurance companies, but required the companies to file collective tariffs that state agencies had the option to reject, lacked sufficient state supervision to qualify for immunity. Id. at 639. To fulfill the active supervision prong, the Court

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[9] Municipalities need not show that the state actively supervises them for them to be immune with regard to their own anticompetitive behavior under the *Parker* doctrine because "there is little or no danger that [a municipality] is involved in a private price-fixing arrangement." *Town of Hallie*, 471 U.S. at 47 (emphasis in the original). "The only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* By way of contrast, when "a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Id.*

held, private parties must prove that state officials "have undertaken the necessary steps to determine the specifics" of the regulatory regime; a mere "negative option" among state agencies to reject prices proposed by private parties is insufficient. Id. at 638-39. "The mere potential for state supervision is not an adequate substitute for a decision by the State." Id. at 638.

The Supreme Court followed a similar approach in *Patrick*, a case that involved an accusation by a physician that a group of his peers had conspired to deprive him of hospital privileges in violation of the Sherman Act. 486 U.S. at 97-98. Although the defendants presented evidence of state policies encouraging physician peer review, the Court rejected their immunity claims because they had failed to show that state actors actively reviewed "private decisions regarding hospital privileges to determine whether such decisions comport[ed] with state regulatory policy and to correct abuses." Id. at 101.

Although the Supreme Court has applied the two-part *Midcal* test in each of its subsequent cases involving an assertion of state-action immunity by a private party, we have twice declined to engage in an independent immunity inquiry for a private party whose alleged anticompetitive conduct was to participate in "concerted" action with a government entity authorized by the state to take such action. Our first decision in this line was *Cine*, a case which, as discussed in Part II.A., above, involved efforts by a state-created entity, the UDC, to improve the Times Square area by purchasing theaters and then leasing them to developers. Although the *Cine* plaintiffs asserted that "collusive and monopolistic" pricing policies would result from the coordinated action between the UDC and the private-party defendants, the only anticompetitive conduct alleged by the plaintiffs to be illegal was the private parties' seeking, and the UDC's awarding, long- term leases on theaters. 790 F.2d at 1037-38; *see also Cine 42nd St. Theater Corp. v. Nederlander Org.*, 609 F. Supp. 113, 119 (S.D.N.Y. 1985),

aff'd, 790 F.2d 1032 (2d Cir. 1986) (setting forth the plaintiffs' contentions). After concluding that the UDC's actions were fully authorized by New York State and therefore immune, we held that such immunity extended automatically to the "private [parties] acting in concert with the UDC." *Cine*, 790 F.2d at 1048. We explained that "[w]hen the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC." Id.

Our second such decision was *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59 (2d Cir. 1998), which involved alleged antitrust-law violations arising from contracts between a state- operated waste-disposal entity and private waste-disposal companies promising to honor each other's exclusive service agreements with various towns. Id. at 63. After concluding that the state agency's actions were authorized under a state statute and thus immune from federal antitrust-law liability, we held, relying on *Cine*, that the private companies were also immune because "[s]ubjecting them to antitrust liability would effectively block [the state entity's] efforts to carry out its mandate through contracts with private parties." *Id.* at 74. As in *Cine*, the only anticompetitive actions allegedly taken by the private-party defendants were those of contracting with the state-created entity. *Id.* at 71.

The Board argues on appeal that the Supreme Court's decision in *Ticor* and ours in *Cine* and *Wheelabrator* stand for the proposition that the active state-supervision test of *Midcal* is applicable only in horizontal price- fixing cases. We disagree. With regard to *Ticor*, the Supreme Court did not limit *Midcal* to any particular form of private anticompetitive conduct, but instead simply cautioned that its holding that the private defendants were not immune "should be read in light of the gravity of the antitrust

offense, the involvement of private actors throughout, and the clear absence of state supervision." 504 U.S. at 639. Four years before *Ticor*, moreover, the Supreme Court, without dissent, applied the active supervision prong in *Patrick*, a case that had nothing to do with price fixing. 486 U.S. at 100.

We think that *Cine* and *Wheelabrator*, rather than departing from the logic of *Midcal*, are consistent with it. Each of the cases in which the Supreme Court or we applied *Midcal* involved governmental authorization of agreements in restraint of trade by private entities or individuals.[10] The danger posed by such schemes is that granting to private actors "a degree of private regulatory power," *Fisher v. City of Berkeley*, 475 U.S. 260, 268 (1986) (citation and internal quotation marks omitted), creates a substantial risk of "frustrating the national policy in favor of competition," *Motor Carriers*, 471 U.S. at 57, by giving them the authority to execute their own anticompetitive schemes. The requirement of active state supervision ensures that anticompetitive acts are driven by the interests of the state, not the private party's own interests. *Town of Hallie*, 471 U.S. at 47.

In *Cine*, the plaintiff did not allege that the private parties were engaging in their own anticompetitive scheme. The sole allegation in *Cine* was that private parties benefitted from a reduction in competition by participating in the government's own regulatory scheme, not that the

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[10]E.g., *Ticor*, 504 U.S. at 625-29 (state laws authorizing private title insurers to set insurance rates, and enforcing the rates by law unless state exercised negative option to reject rates); *Patrick*, 486 U.S. at 95 (state law authorizing horizontal boycotts by doctors); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342-43 (1987) (state law allowing liquor wholesellers to establish retail prices); *Motor Carriers*, 471 U.S. at 50-51 (state laws allowing common carriers to jointly propose prices to agency which would enforce them); *Midcal*, 445 U.S. 97, 99-101 (state law preventing retailers from selling wine below prices established by wine producers for geographic areas).

state had delegated any rule-making or regulatory authority to the private parties. 790 F.2d at 1038-39. There was therefore no allegedly anticompetitive act for the state to supervise.

In *Wheelabrator*, the plaintiff alleged only that the state had itself entered into a horizontal agreement with a competitor. 155 F.3d at 62. When the state enters into an anticompetitive agreement for its own financial benefit, there is no risk that the private acts are part of an anticompetitive scheme that is not "the State's own," *Ticor*, 504 U.S. at 635, and therefore no delegation of governmental authority for the state to actively supervise. Wheelabrator's discussion of *Ticor* applied only to horizontal agreements between private parties and the state as competitors.

Although *Wheelabrator* did say that "*Ticor* has no relevance" unless a case involved "price-fixing," 155 F.3d at 74, this statement must be viewed in light of the facts of that case. In the case at bar, the Village granted the Board exclusivity within its borders. The potential in such a scheme for a private actor to pursue its own anticompetitive interests, rather than the government's, is similar to what it would be had the government authorized competitors jointly to set prices, as in *Ticor*. For example, the plaintiff alleges that the Board threatened to retaliate, in those areas in which it has exclusivity, against those who hire the plaintiff in areas where the plaintiff and the Board compete. If there is evidence that the Village actively supervises the Board's conduct, it may be properly characterized as an "anticompetitive scheme [that is] the State's own." *Ticor*, 504 U.S. at 635. If not, it may properly be viewed as a "gauzy cloak of state involvement over what is essentially private anticompetitive activity," *Motor Carriers*, 471 U.S. at 57 (citation and internal quotation marks omitted), advancing the Board's "own interests, rather than the governmental interests of the State," *Patrick*, 486 U.S. at 100.

We are thus of the view that *Cine* and *Wheelabrator* do not shed doubt on our conclusion that state-action immunity is available for the Board only if it can satisfy *Midcal's* two-prong test.

B. The Board's Actions

We now apply the *Midcal* test to each of the Board's actions that the plaintiff alleges violate the Sherman Act. Perhaps mindful of our observation in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.), that a company does not violate the antitrust laws when monopoly is "thrust upon it," *id.* at 429, the plaintiff does not claim that the Board violated the Sherman Act merely because the Village passed an ordinance according it exclusivity within the Village. Instead, the plaintiff's claim is that the Board actively sought and abused that monopoly power.

1. The First Part of the *Midcal* Test. We concluded in Part II.B., above, that the Village's conferral of exclusivity upon the Board was "an authorized implementation of state policy." *Omni Outdoor*, 499 U.S. at 370. We think that this holding also satisfies the first prong of the *Midcal* test for the Board to the extent that the Board's alleged anticompetitive actions were "pursuant" to the grant of exclusivity. *Town of Hallie*, 471 U.S. at 40. The plaintiff's amended complaint alleges anticompetitive actions by the Board in municipalities other than the Village, suggesting that the first prong of the *Midcal* test for purposes of these actions would depend on the authority of these other municipalities to confer monopoly powers upon the Board. On appeal, however, the plaintiff has not raised arguments addressing these municipalities' authority as distinct from the Village's, and so we assume that our analysis of the Village's authority applies equally to these other municipalities for the limited

purpose of assessing the Board's satisfaction of the first prong of *Midcal*.

The plaintiff also alleges that the Board attempted to monopolize inspections services by seeking government-issued exclusivity. Amend. Compl. ¶¶ 55, 84. Because these actions were not pursuant to state policy, but rather in pursuit of it, they do not appear to qualify for *Parker* immunity. They may, however, be protected under the *Noerr-Penington* doctrine. *See Omni Outdoor*, 499 U.S. at 379-80 (holding that the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657 (1965), establish that "[t]he federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government"). We leave any analysis of this issue to the district court in the first instance on remand.

The Board's alleged poor service and retaliatory threats within the Village, if they occurred, unlike the Board's alleged action in lobbying for exclusivity, were pursuant to the exclusivity granted to the Board in the sense that the Board's insulation from competition would have lent these actions much of their capacity to harm. We thus conclude that these alleged actions pass the first part of the *Midcal* test.[11] Further inquiry into whether the Board is immune with respect to them must be conducted under the second part of the *Midcal* test: whether there was adequate active

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[11]The plaintiff also alleges that the Board has sought to improperly extend use of its monopoly power into localities that have not made it the exclusive provider of inspection services, by threatening customers who use plaintiff's services where they are salable with retaliation in those localities in which the Board has been granted exclusivity. Amend. Compl. ¶¶ 69-72. We leave it to the district court on remand to determine in the first instance whether such actions, if they occurred, were without state-action immunity because they were not reasonably foreseeable anticompetitive effects of the authorized implementation of state policy, or otherwise.

supervision of the Board.

2. The Second Part of the *Midcal* Test. With respect to the active state supervision part of the *Midcal* test as applied to the Board's remaining alleged anticompetitive conduct, the Board argues in the alternative that adequate supervision was present. In support, the Board cites an affidavit in which the Village's mayor asserts that the Village's building department "maintained strict controls over the inspections" by "establishing policies as to the manner in which the electrical inspections were carried out . . . [,] enforc[ing] the requirement that all inspectors . . . possess the appropriate qualifications . . . [and] provid[ing] guidance to the inspectors as to how to proceed." Mayor Frank Falco Aff. ¶ 11. The mayor also asserts in his affidavit that the Village could have replaced the Board at any time by resolution had it become dissatisfied with the Board's services. *Id.* ¶ 16.

As we have noted, the district court did not determine whether the Board was actively supervised, holding instead that this part of the *Midcal* test need not be met. We decline to decide this heavily factual issue in the first instance on the record before us. *See Walker v. Jastremski*, 274 F.3d 652, 655 (2d Cir. 2001). We note that in this context the Village's mere "negative option" to replace the Board at any time is alone likely inadequate supervision, *Ticor*, 504 U.S. at 638 (noting that supervision must be "active"), and leave to the district court on remand the determination in the first instance of what degree or kind of supervision is adequate and suffices for the Board's assertion of immunity to succeed.

IV. The Village's Immunity - Redux

We now return to the question we left unanswered in Part II.C., above: whether the Village's immunity, like the Board's, depends upon a showing that the Board is actively

supervised. As we indicated, we are unaware of an opinion of the Supreme Court or of this Court that has squarely addressed this issue. We note that the Supreme Court has never held that a state's failure to supervise a regulated private party can deprive the state of immunity under *Parker*, even though such a failure can result in liability for the private party. The federalism-based concerns underlying state immunity from an antitrust action seem to us less pressing in this case than in the immunity cases the Court and we have decided, however, in part because the Village is not a sovereign, and in part because the plaintiff seeks only injunctive and declaratory relief against the Village. An injunction might be an appropriate device for blocking municipal regulatory regimes that result in significant anticompetitive action by private parties and that constitute nothing more than a "gauzy cloak of state involvement." *Midcal*, 445 U.S. at 106.

But the question of the need for an injunction will arise in this case only if the district court ultimately determines that the Board is not actively supervised and thus not immune, and that there has in fact been a violation of the antitrust laws. We therefore decline to decide this issue since it may prove unnecessary to the disposition of the case. If the district court determines on remand that supervision is lacking, that antitrust violations have occurred, and that a damages award against the Board would be inadequate to deter future harms, it may consider for the first time whether the *Parker* antitrust immunity doctrine would allow an injunction to issue against the Village even though the Village's actions were authorized by the state.

V. Caveat

It bears both repetition and emphasis that we have done no more than decide that, on the record before us, the defendants are not entitled to *Parker* state-action immunity as a matter of law. Nothing we have said should be read to

imply any views as to the plaintiff's standing under the antitrust laws to raise all of the issues with respect to which it pleads in its amended complaint or as to the possible ultimate merits of its legal claims.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court, and remand the case for further proceedings consistent with this opinion.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th Day of March, two thousand three.

ELECTRICAL INSPECTORS, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

01-9483

VILLAGE OF EAST HILLS, VILLAGE OF ROSLYN and VILLAGE OF OYSTER BAY COVE, Defendants-Counter-Claimants,

VILLAGE OF ISLANDIA, ALEXANDER PIRNIE and NEW YORK BOARD OF FIRE UNDERWRITERS,
Defendants-Counter-Claimants-Appellees,

VILLAGE OF ISLAND PARK, VILLAGE OF BROOKVILLE, VILLAGE OF NORTH HILLS, VILLAGE OF FLOWER HILL, VILLAGE OF GREAT NECK, VILLAGE OF GREAT NECK ESTATES, VILLAGE OF KINGS POINT, VILLAGE OF PORT WASHINGTON NORTH, VILLAGE OF SEA CLIFF, VILLAGE OF SADDLE ROCK and VILLAGE OF BAITING HOLLOW, Defendants.

A petition for panel rehearing and a petition for rehearing en banc having been filed from an AMENDED opinion herein by appellees, Village of Islandia

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing be DENIED.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/
Arthur Heller
Administrative Attorney

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th Day of March, two thousand three.

ELECTRICAL INSPECTORS, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

01-9483

VILLAGE OF EAST HILLS, VILLAGE OF ROSLYN and VILLAGE OF OYSTER BAY COVE, Defendants-Counter-Claimants,

VILLAGE OF ISLANDIA, ALEXANDER PIRNIE and NEW YORK BOARD OF FIRE UNDERWRITERS,
Defendants-Counter-Claimants-Appellees,

VILLAGE OF ISLAND PARK, VILLAGE OF BROOKVILLE, VILLAGE OF NORTH HILLS, VILLAGE OF FLOWER HILL, VILLAGE OF GREAT NECK, VILLAGE OF GREAT NECK ESTATES, VILLAGE OF KINGS POINT, VILLAGE OF PORT WASHINGTON NORTH, VILLAGE OF SEA CLIFF, VILLAGE OF SADDLE ROCK and VILLAGE OF BAITING HOLLOW, Defendants.

A petition for panel rehearing and a petition for rehearing en banc having been filed from an AMENDED opinion herein by appellees, New York Board of Underwriters and Alexander Pirnie

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing be DENIED.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/
Arthur Heller
Administrative Attorney

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

N.Y. EXEC. L. § 371

Statement of legislative findings and purposes

1. The legislature hereby finds and declares that:

a. The present level of loss of life, injury to persons, and damage to property as a result of fire demonstrates that the people of the state have yet to receive the basic level of protection to which they are entitled in connection with the construction and maintenance of buildings;

b. There does not exist for all areas of the state a single, adequate, enforceable code establishing minimum standards for fire protection and construction, maintenance and use of materials in buildings. Instead, there exists a multiplicity of codes and requirements for various types of buildings administered at various levels of state and local government. There are, in addition, extensive areas of the state in which no code at all is in effect for the general benefit of the people of the state;

c. The present system of enforcement of fire protection and building construction codes is characterized by a lack of adequately trained personnel, as well as inconsistent qualifications for personnel who administer and enforce those codes;

d. Whether because of the absence of applicable codes, inadequate code provisions or inadequate enforcement of codes, the threat to the public health and safety posed by fire remains a real and present danger for the people of the state; and

e. The multiplicity of fire protection and building construction code requirements poses an additional problem for the people of the state since it increases the cost of doing business in the state by perpetuating multiple requirements, jurisdictional overlaps and business uncertainties, and, in

some instances, by artificially inducing high construction costs.

2. The legislature declares that it shall be the public policy of the state of New York to:

a. Immediately provide for a minimum level of protection from the hazards of fire in every part of the state;

b. Provide for the promulgation of a uniform code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the state from hazards of fire and inadequate building construction. In providing for such a uniform code, it is declared to be the policy of the state of New York to:

(1) reconcile the myriad existing and potentially conflicting regulations which apply to different types of buildings and occupancies;

(2) recognize that fire prevention and fire prevention codes are closely related to the adequacy of building construction codes, that the greatest portion of a building code's requirements are fire safety oriented, and that fire prevention and building construction concerns should be the subject of a single code;

(3) place public and private buildings on an equal plane with respect to fire prevention and adequacy of building construction;

(4) require new and existing buildings alike to keep pace with advances in technology concerning fire prevention and building construction, including, where appropriate, that provisions apply on a retroactive basis; and

(5) provide protection to both residential and non-residential buildings;

c. Insure that the uniform code be in full force and effect in every area of the state;

d. Encourage local governments to exercise their full powers to administer and enforce the uniform code; and

e. Provide for a uniform, statewide approach to the training and qualification of personnel engaged in the administration and enforcement of the uniform code.

N.Y. EXEC. L. § 377

New York State Uniform Fire Prevention and Building Code

1. The council shall formulate a uniform fire prevention and building code which shall take effect on the first day of January, nineteen hundred eighty- four. The council may from time to time amend particular provisions of the uniform code and shall periodically review the entire code to assure that it effectuates the purposes of this article and the specific objectives and standards hereinafter set forth. The secretary shall conduct public hearings on said uniform code and any amendment thereto. The secretary shall review such code or amendment, together with any changes incorporated by the council as a result of such hearings, to insure that it effectuates the purposes of this article. Upon being so satisfied, the secretary shall approve said code or amendment prior to its becoming effective.

2. The uniform fire prevention and building code shall:

a. provide reasonably uniform standards and requirements for construction and construction materials for public and private buildings, including factory manufactured homes, consonant with accepted standards of engineering and fire prevention practices;

b. formulate such standards and requirements, so far as may be practicable, in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability;

c. permit to the fullest extent feasible, use of modern technical methods, devices and improvements which tend to reduce the cost of construction without substantially affecting reasonable requirements for the health, safety and security of the occupants or users of buildings;

d. encourage, so far as may be practicable, the standardization of construction practices, methods, equipment, material and techniques; and

e. eliminate restrictive, obsolete, conflicting and unnecessary building regulations and requirements which tend to increase unnecessarily construction costs or retard unnecessarily the use of new materials, or provide unwarranted preferential treatment to types or classes of material or products or methods of construction.

N.Y. EXEC. L. § 381

Administration and Enforcement of the New York State Uniform Fire Prevention and Building Code

1. The secretary shall promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform fire prevention and building code promulgated in accordance with sections three hundred seventy- seven and three hundred seventy-eight of this article. Such rules and regulations shall become effective not later than the first day of January, nineteen hundred eighty-five. The secretary shall promulgate such regulations after public hearing and after considering reaction to initial administration and enforcement of the uniform building and fire prevention code, including how local governments have organized to provide for such initial administration and enforcement. Such rules and regulations shall address the nature and quality of enforcement and shall include, but not be limited to the following:

a. frequency of inspections,

b. number and qualifications of staff, including requirements that inspectors be certified pursuant to this chapter,

c. required minimum fees for administration and enforcement,

d. adequacy of inspections,

e. adequacy of means for insuring compliance with the uniform code,

f. establishment of a procedure whereby any provision or requirement of the uniform code may be varied or modified in cases where strict compliance with such provision or requirement would entail practical difficulties or unnecessary hardship or would otherwise be unwarranted. Such procedure shall be designed to insure that any such variance or modification shall not substantially affect adversely provisions for health, safety and security, and that equally safe and proper alternatives may be prescribed. Requests for a variance shall be resolved within sixty days of the date of application unless a longer period is required for good cause shown, and

g. procedures for inspection of certain classes of buildings based upon design, construction, ownership, occupancy or use, including, but not limited to, mobile homes, factory manufactured homes and state-owned buildings.

Nothing in the rules shall require or be construed to require regular, periodic inspections of owner-occupied one and two-family dwellings provided, however that this shall not be a limitation on inspections conducted at the invitation of the owner or where conditions on the premises threaten or present a hazard to public health, safety, or welfare.

2. Except as may be provided in regulations of the secretary pursuant to subdivision one of this section, every local government shall administer and enforce the uniform fire prevention and building code on and after the first day of January, nineteen hundred eighty-four, provided, however, that a local government may enact a local law prior to the first day of July in any year providing that it will not enforce the uniform code on and after the first day of January next succeeding. In such event the county in which said local government is situated shall administer and

enforce the uniform code within such local government from and after the first day of January next succeeding the effective date of such local law, in accordance with the provisions of paragraph b of subdivision five of this section unless the county shall have enacted a local law providing that it will not enforce the uniform code within that county. In such event the secretary in the place and stead of the local government shall, directly or by contract, administer and enforce the uniform code. A local government or a county may repeal a local law which provides that it will not enforce the uniform code and shall thereafter administer and enforce the uniform code as provided above. Local governments may provide for joint administration and enforcement by agreement pursuant to article five-G of the general municipal law. Any local government may enter into agreement with the county in which such local government is situated to administer and enforce the uniform code within such local government. Local governments or counties may charge fees to defray the costs of administration and enforcement.

3. On and after the first day of July, nineteen hundred eighty-five, the secretary shall have power to investigate and conduct hearings relative to whether administration and enforcement of the uniform fire prevention and building code complies with the minimum standards promulgated pursuant to subdivision one of this section. At least ten days written notice of any such hearing shall be provided to the elective or appointive chief executive officer or, if there be none, the chairman of the legislative body of the local government or county whose administration and enforcement of the uniform code is at issue.

4. If the secretary determines that a local government has failed to administer and enforce the uniform fire prevention and building code in accordance with the minimum standards promulgated pursuant to subdivision

one of this section, the secretary shall take any of the following actions, either individually or in combination in any sequence:

a. The secretary may issue an order compelling compliance by such local government with the standards for administration and enforcement of the uniform code.

b. The secretary may ask the attorney general to institute in the name of the secretary an action or proceeding seeking appropriate legal or equitable relief to require such government to administer and enforce the uniform code.

c. the secretary may designate the county in which such local government is located to administer and enforce the uniform code in such local government. In the case of such designation, the provisions of subdivision five of this section shall apply.

d. The secretary may, in the place and stead of the local government, administer and enforce the uniform code in accordance with the minimum standards promulgated pursuant to subdivision one of this section. In such event, the provisions of subdivision five of this section shall apply.

5. Where the secretary has designated a county to administer and enforce the uniform fire prevention and building code within a local government or has assumed authority for administration and enforcement pursuant to subdivision two or paragraph d of subdivision four of this section:

a. Such local government or county government shall not administer and enforce the uniform code, and shall not

charge or collect fees for such administration and enforcement.

b. Such county shall administer and enforce the uniform code within such local government from and after the date of such designation. Such administration and enforcement shall apply the minimum standards promulgated by the secretary pursuant to subdivision one of this section. Notwithstanding any other provisions of law, such county shall have full power to administer and enforce the uniform code in accordance with such minimum standards, including the power to charge and collect fees for such administration and enforcement.

c. The secretary shall designate the local government or county government to resume administration and enforcement of the uniform code when the secretary is satisfied that such local government or county will provide such administration and enforcement in compliance with the minimum standards promulgated pursuant to subdivision one of this section.

d. The provisions of subdivisions three and four of this section shall apply to counties which have been designated to administer and enforce the uniform code in such local government.

6. The secretary shall study and from time to time make recommendations to the governor and legislature concerning:

a. Appropriate means to provide encouragement, support and inducements for local governments and counties to exercise their responsibilities pursuant to this section; and

b. Appropriate means to provide encouragement, support and inducements to facilitate compliance with the provisions of the uniform code.

19 N.Y. C.R.R. Part 429 (1981)
(withdrawn 1996)

§ 429.2 **Administration and enforcement of the State Building Construction Code**

(a) *Building permits.* (1) No person, firm, corporation, association or other organization shall commence the erection, construction, enlargement, alteration, improvement, removal, or demolition of any building or structure or any part thereof without having first obtained a building permit therefor from the clerk of the city, town, or village in which such work is to be done, except that no such permit shall be required for the performance of necessary repairs which are not of a structural nature and which do not involve violations of the State Building Construction Code.

* * * *

(b) *Inspections.* (1) To ensure that a building or structure complies with the applicable provisions of the State building Construction Code, all work for which a building permit has been issued shall be inspected for approval prior to enclosing or covering any portion thereof upon completion of each stage of construction, including, but not limited to, excavation, foundation, superstructure, electrical, plumbing, heating, and air conditioning. Every such building shall, in addition, be inspected on final completion. Inspections pursuant to this paragraph shall be a condition precedent to the issuance of certificates of occupancy.

(2) the local legislative body of a city, town, or village may by resolution, provide that such inspections be performed by:

(i) a designated officer or employee of the city, town or village who is qualified to conduct such inspections;

(ii) a designated officer or employee of another city, town, or village who is qualified to conduct such

inspections and who provides such inspection services under an agreement pursuant to article 5-G of the General Municipal Law

(iii) a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village;

(iv) an employee or agent of the county who is qualified to conduct such inspections within the local government;

or

(v) a competent inspector, designated or approved by the city, town or village, whose fee shall be paid by the person, firm, corporation, association or other organization to which the building permit was issued.

Where no such resolution has been enacted, such inspection shall be performed in the manner provided in subparagraph (v) of this paragraph.

(3) The authorized inspector shall have the power to order in writing the remedying of any condition found to exist in, on, or about any building in violation of the State Building Construction Code. Such orders may be served upon the owner or his authorized agent personally or by registered mail sent to the address set forth in the application for the building permit. The local legislative body may by resolution grant such time as may be reasonably necessary for achieving compliance with such order.

(4) It shall be the responsibility of the owner, applicant or his agent to inform the appropriate inspector that the work is ready for each required inspection and to schedule such inspection.

(c) *certificates of occupancy* (1) No building or structure for

which a permit was issued shall be used or occupied until a certificate of occupancy shall have been issued by the clerk of the city, town, or village.

(2) When, after final inspection, it is shown that the proposed work has been completed in compliance with all applicable laws, rules, and regulations, the city, town, or village clerk shall issue a certificate of occupancy.

(d) *Fees*. The local legislative body may by resolution establish reasonable fees for the permits, inspections, certificates, and other requirements of this section.

(e) *Board of review*. The State Building Construction Board of Review shall have the powers and duties with respect to the State Building Construction Code provided in sections 381 and 382 of the Executive Law.

(f) *Remedies*. The provisions of sections 384-386 of the Executive Law shall be deemed to apply to this section.

§ 429.3 Administration and Enforcement of the State Building Conservation and Fire Prevention Code
(a) *Inspections*. (1) All buildings and premises to which the State Building Conservation and Fire Prevention Code applies shall be periodically inspected for compliance with the provisionsof such code, except that owner-occupied and one- and two-family dwellings shall not be subject to regular, periodic inspections; provided, however, that this shall not be a limitation on insections conducted at the invitation of the owner or where onditions on the premises threaten or present a hazard to the public, health, safety, or welfare.

(2) the local legislative body of a city, town, or village may by resolution, provide that such inspections be performed by:

(i) a designated officer or employee of the city, town or village who is qualified to conduct such inspections;

(ii) an employee or agent of another city, town, or village who is qualified to conduct such inspections and who provides such inspection services under an agreement pursuant to article 5-G of the General Municipal Law

(iii) a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village;

(iv) an employee or agent of the county who is qualified to conduct such inspections within the local government;

or

(v) the chief of the fire department, fire corporation, or fire company responsible for fire protection at the place where such building or premises is located, or a member of such fire department, fire corporation, or fire company assigned by said chief to make such inspections.

Where no such resolution has been enacted, such inspection shall be performed in the manner provided in subparagraph (v) of this paragraph.

(3) The authorized inspector shall have the power to order, in writing, the remedying of any condition found to exist in, on, or about any building in violation of the State Building Conservation and Fire Prevention Code. Such orders may be served upon the owner or his authorized agent personally or by registered mail sent to the address set forth in the application for permission for construction of such building or at his actual place of business. The local legislative body may by resolution grant such time as may be reasonably necessary for achieving compliance with such order.

(b) *Board of review.* The State Building Construction Board of Review shall have the powers and duties with respect to

the State Building Conservation and Fire Prevention Code provided in sections 381 and 382 of the Executive Law.

(c) *Fees*. The local legislative body may by resolution establish reasonable fees for the permits, inspections, certificates, and other requirements of this section.

(d) *Remedies*. The provisions of sections 384-386 of the Executive Law shall be deemed to apply to this section.

§ 429.4 Local Laws and Ordinances

In lieu ofthe procedures set out in sections 429.2 and 429.4 of this Part, a local legislative body of a city, town, or village may at any time enact a local law or ordinance, consistent with the articles 18 and 18-A of the Executive Law, providing for the administration in such city, town, or village of the State Building Construction and Fire Prevention Code. Such local law or ordinance may provide for:

(a) examination, approval, and disapproval of plans or specifications;

(b) issuance and revocation of permits, licenses, certificates, and similar documents;

(c) inspections;

(d) remedying of any condition in, on, or about any building found to be in violation of the codes;

(e) designating personnel to enforce the codes;

(f) promulgation, amendment, and repeal of rules and regulations in aid of such adminstration and enforcement;

(g) collection of reasonable fees;

(h) review and, where appropriate, modification of determinations, orders, and proceedings;

(i) remedies for violations; and

(j) all things necessary or desirable to further the objectives of the State Building Construction Code, the State Building Conservation and Fire Prevention Code, and the laws and regulations pertaining thereto.

Supreme Court, U.S.
FILED
OCT 2 2003
OFFICE OF THE CLERK

No. 03-192

IN THE

Supreme Court of the United States

VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS and ALEXANDER PIRNIE,

Petitioners,

v.

ELECTRICAL INSPECTORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

RONALD C. BURKE
BRAND, BRAND & BURKE
122 East 42nd Street
Suite 4700
New York, NY 10168
(212) 808-8008

Attorneys for Respondent

183368

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15.2, respondent, ELECTRICAL INSPECTORS, INC., objects to the questions presented by petitioners VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS, and ALEXANDER C. PIRNIE ("petitioners") because they are unduly argumentative in violation of Supreme Court Rule 14.1(a) and seek consideration of questions not accurately reflecting the proceedings or holding below. If this Court is inclined to grant certiorari in this action, respondent respectfully submits that the following are more accurately-phrased questions:

1. Was the Second Circuit correct in applying the "active supervision" requirement set forth in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in reversing summary judgment based on allegations that a private corporation, authorized by local municipalities to exclusively provide a state mandated service pursuant to contracts with other private parties, had been allowed "to use its power of exclusivity to determine the price, terms, and quality of its services. . . ."? Pet., A at 26a.

2. Was the Second Circuit correct in holding that the petitioners' alternative argument that the Village of Islandia had engaged in "active supervision" of the private party petitioner a "heavily factual issue" that could not be resolved based on the appellate record?

STATEMENT PURSUANT TO RULE 29.6

ELECTRICAL INSPECTORS, INC. is a business corporation. It has no parent or publicly held company owning any of its shares.

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STATEMENT OF THE CASE

The respondent, ELECTRICAL INSPECTORS, INC. (the "respondent") provides electrical inspection and certification services to property owners in direct competition with the private party petitioner. The respondent seeks money damages, declaratory and injunctive relief for the anti-competitive activity of petitioner, NEW YORK BOARD OF FIRE UNDERWRITERS (hereinafter "THE BOARD") in municipalities throughout Nassau and Suffolk Counties in the State of New York. Respondent claims that THE BOARD illegally maintained unregulated monopolies in many municipalities on Long Island which compelled property owners to enter into contracts with THE BOARD for electrical inspection/certification services. THE BOARD's abuse of its monopoly power has been facilitated due to the absence of local governmental supervision of services and/or regulation of fees.[1] We emphasize that the respondent claims not merely inadequate supervision, but the absence of *any* supervision of the terms, services or fees rendered by The Board to other private parties.

The respondent seeks declaratory and injunctive relief from the conduct of petitioner VILLAGE OF ISLANDIA (hereinafter "ISLANDIA"), which passed a resolution in 1988 that granted a perpetual, unlimited and unsupervised exclusive franchise to THE BOARD. Henceforth, all ISLANDIA property owners were required to hire and pay THE BOARD. This legislation was not self-policing and failed to include any means of municipal supervision

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1. It is claimed that THE BOARD exploited its monopoly power through deceptive business practices, unfair competition, substandard service, trade disparagement and retaliatory threats.

of the private party monopolist. *See* Ct. App. J.A. 79. The petitioners' brief incorrectly states that ISLANDIA's resolution was "renewed annually" suggesting some degree of further legislative consideration. Pet. at 1. To the contrary, ISLANDIA's Mayor Falco explained that the 1988 resolution was never repealed but that the Village Board of Trustees could exercise a negative option to repeal the resolution if THE BOARD failed to properly perform its obligations. *See* Ct. App. J.A. 607, 611 (affidavit of Mayor Frank B. Falco, ¶16).

THE BOARD is a not-for-profit corporation whose membership consists of 96 insurance companies who sell fire insurance policies in the State of New York.[2] The insurance industry, through THE BOARD, controls the terms of electrical inspection service in a substantial part of New York State. According to the petitioners, ISLANDIA is just one of approximately 250 municipalities in the State of New York (out of 1000) that have established an exclusive franchise for the benefit of THE BOARD. Pet. at 3. These municipalities do not supervise electrical inspection services or regulate THE BOARD's fees. Rather, it is THE BOARD that establishes a statewide rate structure applicable to all property owners it contracts with.

It is conceded that THE BOARD does not negotiate its rate structure with property owners or municipalities. Indeed, the District Court found that ISLANDIA "does not purport to regulate THE BOARD's fees". *See* Ct. App. J.A. 824.

2. Though there has been litigation arising from state action immunity issues concerning what constitutes a "private" or "public actor", THE BOARD does not contest its characterization by the District Court as a private party. *Fuchs v. Rural Elec. Convenience Coop.*, 858 F.2d 1210 (7th Cir. 1988).

THE BOARD claims that its fees are set below cost and that it is able to operate at a loss because it is subsidized by its member insurance companies. *See* Ct. App. J.A. 458 (affidavit of Alexander Pirnie, ¶16). Despite the insurance industry subsidy, respondent's president advised the lower court that: ". . . depending on the nature and type of electrical work performed, the residents of Islandia and Oyster Bay Cove would save money if allowed to hire plaintiff Electrical Inspectors, Inc." *See* Ct. App. J.A. 650 (affidavit of Richard M. Bivone).

The nature of the anti-competitive activity challenged is private because it concerns only the contractual relationship between THE BOARD and each individual property owner. As noted by the Second Circuit: ". . . when THE BOARD conducts an inspection, or allegedly threatens those who hire the plaintiff, it is engaging in transactions or seeking to engage in transactions with other private parties, not the Village." Pet. App. at 25a. Since THE BOARD is not directed or supervised, its activities do not constitute "official action" but are merely those of an outside contractor operating independently with the general public. Moreover, many of the allegations of misconduct alleged against THE BOARD, such as deceptive business practices, unfair competition, trade disparagement and harassment of electricians, are clearly not those of the involved municipalities. The antitrust injury alleged flows from the acts of a private corporation subsequent to obtaining a monopoly.

The respondent claims that the monopoly held by THE BOARD in many municipalities, including ISLANDIA, is "even more harmful due to the absence of governmental regulatory control . . .". *See* Ct. App. J.A. 42. THE BOARD did not submit any evidence to demonstrate that other

municipalities had engaged in any supervision of its services. Though ISLANDIA claimed that it informally and periodically inspected the work of the electrical inspectors employed by THE BOARD, a sharp issue of fact was presented based on the affidavits of Richard Jendzo and Richard M. Bivone. *See* Ct. App. J.A. 697 and 646, respectively.[3] According to the Jendzo affidavit, THE BOARD used unsupervised, uncertified, low paid electrical inspectors in ISLANDIA who "supplemented their salaries by accepting unreported cash gifts from electrical contractors". *See* Ct. App. J.A. 697. In fact, the lower court never resolved the heavy factual issues regarding whether government officials in ISLANDIA actively supervised the contract terms and services rendered by THE BOARD. Therefore, once it found the *Midcal* test applied, the Second Circuit properly remanded this factual issue to the District Court to determine if there was adequate active supervision of THE BOARD by ISLANDIA and other municipalities.

REASONS FOR DENYING THE PETITION

All parties agree that THE BOARD is a private party; that it has been given an exclusive franchise by many local governments, including ISLANDIA, to provide electrical inspection/certification services; that THE BOARD independently enters into contracts with other private property owners to provide its services for a fee; that THE BOARD does not negotiate its fees with local governments or property owners, but unilaterally fixes a statewide schedule

3. The District Court was advised by an electrical inspector, Richard Jendzo formally employed by The Board (presently employed by respondent), who had been assigned to Islandia, that the latter "did not supervise my inspections or instruct me in the manner of how those instructions should be performed." Ct. App. J.A. 698.

of fees. The petitioners raised a hotly disputed issue of fact on whether ISLANDIA actively supervises THE BOARD; however, THE BOARD did not submit any evidence refuting the respondent's claim that it was unsupervised by all other municipalities.

Among the questions presented by the petitioners is whether the respondent's claims should be dismissed pre-discovery on a Rule 56 Federal Rules of Civil Procedure summary judgment motion based on the state action immunity doctrine even though: (1) the petitioners admit that ISLANDIA and other municipalities do not participate in or supervise the fees charged by THE BOARD; (2) there is a hotly disputed question of fact on whether ISLANDIA has actively supervised THE BOARD; and (3) THE BOARD has not submitted evidence to overcome the respondent's claim that other municipalities neglected to actively supervise it.

The Second Circuit properly found that immunity for anti-trust violations would not be available unless the petitioners satisfied the two-prong test set forth by this Court in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Second Circuit noted that the District Court: "did not determine whether THE BOARD was actively supervised, holding instead that this part of the ***Midcal*** test need not be met. We decline to decide this heavily factual issue in the first instance on the record before us." Pet., App. A at 28a. The petitioners were not entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in light of the unresolved fact issues.

There is no conflict amongst the Circuit Courts or lack of clarity from the Supreme Court on the active supervision requirement set forth in *Midcal*.[4] The petitioners raise the spector of excess litigation and possible loss of private party participation in state programs due to the factual findings that may be necessary in order to satisfy *Midcal's* active supervision requirement. Recognizing these very same concerns, Justice Scalia wrote in his concurring opinion for *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 641 (1992):

> . . . this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total abandonment of some state programs because private individuals will not take the chance of participating in them . . . I am willing to accept these consequences because I see no alternative within the constraints of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the *Parker v. Brown* exemption for state-programmed private collusion in the first place.

The petitioners also implicitly raise a false issue in suggesting that the degree of active supervision necessary is an important and ripe issue. This issue is not ripe. There have not been any findings of fact on petitioner's affirmative defense since their motion for summary dismissal preceded discovery.

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4. The New York State Attorney General filed an amicus curiae brief supporting the respondent. *See* Ct. App. J.A. 306. In 1983 another New York State Attorney General filed an amicus curiae brief (on the applicability of the state action immunity doctrine to a state anti-trust claim) and opined that THE BOARD would have to satisfy the *Midcal* test. *See* Ct. App. J.A. 207, 219.

THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH THE STANDARDS WELL ESTABLISHED BY THIS COURT

Since the seminal holding of *Parker v. Brown*, 317 U.S. 341 (1943), the Court has continued to refine the standards that govern state action immunity with respect to anti-trust actions involving state or local government entities. Over time, the actions of private parties in pursuit of a state's statutory mandate have also become subject to *Parker* immunity. For a private party that behaves anti-competitively to avail itself of this immunity, it must be able to show that the actions taken were not only authorized by state policy, but that its anti-competitive conduct was supervised by the state. *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). The *Midcal* standard, as opposed to the standard set forth in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) must be applied to THE BOARD's actions because it is the anti-competitive activity of THE BOARD that has caused the anti-trust injury to the respondent. The vitality of Parker and its progeny regarding the ant-trust liability of private parties was confirmed by the Court in *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992):

> *Midcal* confirms that while a state may not confer anti-trust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the state and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general

> auspices of state law, is the pre-condition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State . . .

Ticor explains that the purpose of the active supervision inquiry is to determine and confirm that the best interests of the state are being served rather than that of the private parties. The active supervision requirement is necessary to establish "whether the State has exercised sufficient independent judgment and control so that the details of the rates for prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." 504 U.S. at 634. The holding noted that the presence of state regulatory instruments is insufficient to meet the active supervision requirement. The tools of state regulation must actually be used. The active supervision requirement "serves essentially an evidentiary function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 36 (1985).

The municipalities complained of, including ISLANDIA do not maintain any written regulations governing the conduct of the private party to whom they granted a monopoly. There is and can be no claim here that "the state exercises ultimate control over the challenged anti-competitive conduct . . . The mere presence of some state involvement or monitoring does not suffice". *Patrick v. Burget*, 486 U.S. 94 (1988). ISLANDIA admittedly plays no role in establishing THE BOARD's fees. Claims supported by competent evidence that other municipalities do not supervise THE BOARD were not rebutted. *See* Ct. App. J.A. 36, 646, 697 (amended complaint, affidavits of Richard M. Bivone and Richard Jendzo, respectively). ISLANDIA raised an issue of fact and insisted that supervision was exercised over delivery of services and that it maintained a negative option.

The Supreme Court in *Patrick* rejected the immunity claims of the private party defendants because they had failed to satisfy active state supervision of "private decisions regarding hospital privileges to determine whether such decisions comport[ed] with state regulatory policy and to correct abuses". 486 U.S. at 101. This decision was significant because the active supervision requirement of *Midcal* was applied to a case that did not involve price fixing.

Although it predates *Ticor* by four years, *Patrick* highlights the wide scope of anticompetitive activity that active supervision must police. Anticompetitive behavior takes many insidious forms from a competing hospital's physicians providing unfavorable peer review to a rival electrical inspection company that takes a market hostage using predatory marketing tactics. *Patrick* and *Ticor* clearly elucidate the active and direct role state supervisory bodies must take because "[a]bsent [supervision], there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." 486 U.S. at 101. These two cases stand for the proposition courts must look beyond what states *can* do but instead focus on the *actual* steps taken to monitor private conduct to determine if active supervision was taken.

THERE IS NO CONFLICT AMONG THE FEDERAL CIRCUITS REGARDING THE ACTIVE SUPERVISION REQUIREMENT

In cases involving utilities, cable companies and telephone providers, the requirement of active state supervision is met when a regulatory body, or legislative commission exists that can develop a public record, review the licensee's rates, business plans, etc. on a regular basis. *Municipal Utilities Bd. v. Alabama Power Co.*, 21 F.3d 384, 387 (11th Cir. 1994) (State statute empowering utility to divide state into service territories had a legislative review mechanism in place; legislation can meet both parts of the *Midcal* test); *DFW Metro Line v. Southwestern Bell*, 988 F.2d 601 (5th Cir. 1993) (Active supervision requirement fulfilled by the state public utility commission, which reviews and creates a record for tariffs and franchise applications in the telecom industry). Furthermore, legislation passed that has anti-competitive effects or creates advantages for one party in a given market can be self policing when the wording of the legislation provides for measures in which the state can review its own actions. *See Snake River Valley Electric Ass'n v. Pacific Corp.*, 238 F.3d 1189 (9th Cir. 2001) (statute enabling electric company to eliminate competition in the market was not "self-policing" nor was there a state method of reviewing the company's actions; therefore, active supervision was not met). Clearly, ISLANDIA's resolution was not "self policing", nor did it enact any written regulations governing THE BOARD. Regardless of the supervisory method selected, the state must show it exercised "sufficient independent judgment and control". *Ticor*, 504 U.S. 621 at 634-35.

The local municipalities, including ISLANDIA, lack the characteristics necessary to establish supervision counter to what petitioner argues. Though many local governments passed an ordinance naming THE BOARD as the exclusive provider of electrical inspections, selection alone does not constitute active supervision. THE BOARD has been left to its own devices to strengthen it's dominance by anticompetitive action without oversight from the local authorities. It is not enough that the local governments have the statutory power to select THE BOARD. Once selection is completed, active supervision must be performed to insure that the interests of a private enterprise do not supercede the community's. This can only be done by when local authorities act in a manner consistent with cases like *Municipal Utilities Board* and *DFW Metro Line*.

The Eleventh Circuit held that active supervision was met when Alabama state legislators exercise their power to review and approve the transactions entered into by a utility company and in the case of a telephone franchise. In *DFW Metro Line*, the state PUC compiles records and is the final approving body when a service provider seeks to change its tariff rates. *See also Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1147 (1st Cir.), *cert. denied*, 510 U.S. 818 (1993) (Agency review and the ability to modify proposed changes to prices "unquestionably" satisfies active supervision).

The state, in order to include the private party into its scope of immunity, must demonstrate the ability to review, and more importantly, revise actions taken by the private party. *See Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41, 50-51 (D. Mass.), *appeal dismissed*, 158 F.3d 51 (1st Cir. 1998) (No active supervision met when state lacks

the power to review or revise prices); *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1071 (1st Cir. 1990) ("Where . . . the state's program is in place is staffed and funded, grants to the state officials ample power and duty to regulate pursuant to declared standards . . . more need not be satisfied.") But *see Ticor* at U.S. 621, 637-39 ("The criteria set forth by [The New England Motor Rate Bureau] may have some relevance as the beginning point of the state supervision inquiry, but the analysis cannot end there . . . The mere potential for state supervision is not an adequate substitute for a decision by the State"); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris, Inc.*, 263 F.3d 239, 255 (3d Cir. 2000) ("When it is uncertain whether an act should be treated as state action for the purposes of *Parker* immunity, we apply . . . [the *Midcal* test].")

Questionable dealings between an exclusive private party provider and other private parties can be cured by applying active state supervision. No such protection is present here. In *Michigan Pay-Tel Joint Venture v. City of Detroit*, 287 F.3d 527, 538 (6th Cir. 2002), the Sixth Circuit reasoned that: "[I]f the private actor was the effective decision-making authority, then it is not immune, unless it can show that it was actively supervised by the state." Therefore, it was not the decision of the Village authorities naming THE BOARD as the exclusive inspection provider, but rather the exclusive provider's subsequent anticompetitive conduct that triggers the *Midcal* requirements. Private parties are not municipal agents when they make "independent decisions without the input, advice, involvement, or oversight of the Village or any other governmental body." *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 481 (6th Cir. 1990).

After considering the facts and law, the Second Circuit properly held that the petitioners had raised an issue of fact on the state action immunity affirmative defense. The *Midcal* test was properly triggered based on the record.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

RONALD C. BURKE
BRAND, BRAND & BURKE
122 East 42nd Street
Suite 4700
New York, NY 10168
(212) 808-8008

Attorneys for Respondent

(3)

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IN THE

Supreme Court of the United States

VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS, and ALEXANDER C. PIRNIE,
Petitioners,

v.

ELECTRICAL INSPECTORS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

DONALD T. RAVE, JR.
LAW OFFICES OF
DONALD T. RAVE
11 The Plaza
Locust Valley, NY 11560
(516) 671-1295

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street
8th Floor
New York, NY 10013
(212) 334-8813

FRANK AMBROSINO
REILLY, LIKE, TENETY
& AMBROSINO
179 East Neck Road
Babylon, NY 11704
(631) 669-3000

October 28, 2003

Attorneys for Petitioners

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition offers no convincing basis for denying review.

1. As the Petition explained, the decision below resolved three significant, closely-related questions of antitrust immunity law in a manner that cannot be reconciled with this Court's teaching or with the understanding that prevails in other federal circuits.

a. The Second Circuit rule untethers the "active supervision" requirement of *Midcal* from its moorings in federal antitrust law. Where this Court's cases have inquired into "active supervision" when *private conduct that would otherwise violate the Sherman Act* is defended on the ground that it is authorized by State law, *see, e.g.*, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1991) (private price-setting agreement); *Patrick v. Burget*, 486 U.S. 94, 101 (1986) (concerted refusal to deal), the decision below held that a local government's entitlement to immunity depends on its persuading a federal court that its "supervision" of the *"quality of service*[]," Pet.App.25a (emphasis added) provided under a lawful exclusive designation was "active" enough.

i. Whatever similarity the "poor service" Islandia residents supposedly receive on account of the exclusive designation may bear to the *effects* of conduct that violates the Sherman Act, "poor service" is not the sort of *anti-competitive conduct* that triggers "active supervision" analysis. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (that restraint has the same *effect* as concerted action is not a basis for Section 1 liability); *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001); *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n,* 197 F.3d 560, 565 (1st Cir. 1999).

ii. Indeed, the central harm *to competition* – and to Respondent, the Board's would-be competitor – is effected by the *designation itself*, the lawfulness of which was resolved by the Second Circuit, in a ruling unchallenged here, *see* Pet.App.14a-16a (holding *Town of Hallie* test to have been

satisfied).[1]

iii. Consistent with these principles, the Petition showed, the vast weight of authority outside the Second Circuit rejects (explicitly and by necessary implication) the notion that allegations of "low quality service" (or even "high prices," *see Arsberry*, 244 F.3d at 566), *pursuant to a lawful exclusive designation*, should trigger the *Midcal* inquiry. Indeed, as we explained, the Second Circuit's decision would effectively limit this Court's most recent local government immunity decision, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), to its facts. The plaintiff in that case surely *could have* raised triable factual issues as to whether the incumbent's service to its customers was satisfactory (not to mention whether the municipality's supervision of that service was sufficiently attentive).

b. The Second Circuit rule also breaks with settled law in treating allegations that a private party is "abusing" the "monopoly" effected by a lawful designation – *i.e.*, by engaging in private "anticompetitive" transactions "subsequent to" the designation, Opp. 3 – as shifting the applicable immunity analysis from *Hallie*'s standard to *Midcal*'s.[2] Even if Respondent's scattershot allegations of business misconduct outside Islandia could be substantiated

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[1]The unarguable significance of *that* ruling is that both the exclusive designation and its *adverse effect on competition* were authorized under State law. *See id.* 15a (concluding that "[t]he specific anticompetitive harm * * * [*i.e.*,] plaintiff's complete exclusion from the market * * * * [was] a foreseeable result of [the New York] statute").

[2]In using the term "monopoly" to describe the Board's position in Islandia, Petitioners obviously do not concede that the Village (whose total population is roughly 3000, and which is one of 31 incorporated villages within Suffolk County alone) could be described as a "market" for purposes of any substantive antitrust law analysis. Similarly, Petitioners make no concession that the New York Board is, for all relevant purposes, "private." *Compare* Opp.2 n.2 *with* Pet. 1 (correctly describing it as "a quasi-public, not-for-profit, fire safety body"). Rather, we recognize that the questions presented for this Court's decision would require the same answer in a case involving (as many do) a designee that (unlike the Board) is "private" in every sense.

(and even if they stated cognizable violations the *Sherman Act*) – that law does not make local governments accountable for "private transactions" of their designees that are conceded to be "independent of" any municipal action.

3. Building on these two rulings, the appeals court committed further error in holding that the federalism concerns underlying *Parker* immunity did not require dismissal of the Village from the case, even after it was settled that Islandia's only challenged conduct – the delegation – was entirely lawful. The rationales for this ruling – that, federalism concerns are muted because Islandia is not a "sovereign" and because further litigation would result (at most) in injunctive relief, Pet.App.28a – are irreconcilable with this Court's case law, and the ruling gives drastically short shrift to the incursion on State sovereignty inherent in a federal antitrust court's passing judgment on a local governments' performance of its traditional public safety responsibilities.

2. EII's Brief in Opposition does not dispute the importance of the immunity issue involved here, and its limited attempt to disprove the conflict between the Second Circuit's rulings and the decisions of other federal courts does not extend to addressing the decisions cited in the Petition – or even acknowledging, let alone discussing, this Court's decision in *Omni*.

Instead, Respondent principally (1) insists that the questions presented are not "ripe" for review (Opp. 6) and (2) seeks to show that the Second Circuit's decision – at least with respect to the New York Board – was correct on its merits (the Opposition offers no defense of the Second Circuit's decision to require the Village to defend the case – and simply omits that issue from its "restatement" of issues presented).

As we show, review at this juncture is not only appropriate, but – in view of the importance of the question, the conflict among the federal courts, and the special need of local governments for clear *ex ante* guidance – necessary. To

the extent the correctness *vel non* of the decision below are relevant to this Court's certiorari decision, moreover, they strongly favor review.

I. The Questions Presented Are Ripe for Review

A. EII argues that review ought to be denied because the issue whether Islandia's "supervision" was active enough is the subject of a fact-intensive dispute, one which the Second Circuit permissibly left for the district court to determine in the first instance. *See* Opp.5-6; *id.* i (purporting to "re-phrase" questions presented to include whether it was error to describe the "supervision" inquiry as "heavily factual").

1. But the Petition *does not* seek review (even "implicitly," Opp.6) of the appeals court's decision not to conduct the second *Midcal* inquiry for itself. Rather, the Petition raises the threshold legal question: whether immunity *should* depend on persuading a federal court that the Board's "quality of service" is being actively supervised. As the district court held, even if questions about the Village's supervision are "hotly" disputed, Opp.5, such disputes are, under correct legal principles, "[im]material." *See* Fed. R. Civ. P. 56(c).[3]

2. Respondent's criticisms of Petitioner's statement of the case (Opp. 2-5) proceed from the same misunderstanding. Whether a defendant is accused of providing "no supervision," *id.* at 4 – as opposed to merely inadequate supervision – or whether the supervisory "deficiency" extends to rates, as well as "service" – is no moment if, as the district court correctly held, *see* Pet.App.40a, "supervision" is not a

[3]To be clear, Petitioners do not disavow their alternative argument below, *i.e.*, that the record in this case conclusively establishes that Islandia's supervision of the New York Board *is* active. Rather, we recognize that if the Second Circuit *were* right in pronouncing the "supervision" issue *material*, *see* Fed. R. Civ. P. 56(c), its decision to allow the district court to determine whether Respondents have carried their burden of identifying a "*genuine*" factual dispute on that point, *id.*, would not warrant this Court's discretionary review. *See* S. Ct. R. 10.

proper part of the immunity analysis.[4]

B. The questions the Petition actually *does* present can and should be resolved at this juncture. The prospect that Petitioners will prevail at the end of a fact-intensive immunity inquiry – or that Respondent's case will falter at the liability or remedy stage, *see* Pet.App.29a – is hardly the equivalent of pretrial dismissal under the proper immunity standard. *See* 1A AREEDA & HOVENKAMP, ANTITRUST LAW at 387 (2000) ("the *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial"). As numerous courts have recognized in entertaining interlocutory appeals from adverse immunity decisions (*see* Pet.22.), the protections of the *Parker* doctrine are not vindicated when a local government *ultimately* prevails, after being subjected – unnecessarily – to the burdens of litigation.

1. The need for prompt review is especially strong because the impact of the Second Circuit's rule extends so far beyond its effect on the outcome of *litigated disputes*. As even EII recognizes (Opp. 6), the existence of treble damage liability for private parties and the expense of litigation for government defendants means that even *correct* (but less-than-bright-line) immunity rules carry substantial potential to deter government actions that, if actually adjudicated, would be upheld as lawful.

2. Respondent's rejoinder, that such deterrence and uncertainty are inevitable concomitants of the active supervision requirement, *see* Opp.6 (quoting Justice Scalia's concurring opinion in *Ticor Title*), paints with far too wide a brush. The breadth of governmental (and private)

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[4]On the subject of rates, even if it is overlooked (1) that Respondent's complaint dwelled exclusively on "service" allegations and (2) that *EII* was the source of the idea that the Board's rates are unfairly *low*, Pet.6, the uncontested fact that the Board charges Village customers *the same price* as it does those in jurisdictions where open competition prevails, Opp.2., would rule out any minimally plausible claim of monopoly pricing. In any event, *EII* is not injured by the prices the Board charges in Islandia – only by the exclusion effected by the Village resolution.

decisionmaking affected by the Second Circuit's rule is orders of magnitude beyond that which the concurring opinion in *Ticor* pronounced tolerable.

Not only is "active supervision" of "quality of service" a far more nebulous concept than the active rate review required under *Ticor*, *see Omni*, 499 U.S. at 377 (rejecting, as "impractical[ly] * * * vague," rule that would deny immunity to governmental actions adjudged "not in the public interest"), but the Second Circuit's rule is not limited to the discrete, relatively rare situations where a government authorizes private competitors to set rates by agreement (or to engage in other conduct that is, in the absence of government permission, comparably offensive to the Sherman Act). It extends to *every* exclusive government franchise or designation – and, as a logical matter, to any governmental act that has the effect of eliminating, diminishing, or failing to encourage competition. *See* Pet. 13-15 (citing variety of governmental decisions affected).

II. There Is A Real And Plain Conflict Between The Second Circuit Rule And Decisions of This And Other Federal Courts

Respondent's purported demonstration that there is "no conflict" of authority (Opp. 10-13) consists of (1) ignoring the many closely analogous – and nearly identical – cases the Petition identifies (Pet. 12-15), in which assertions of immunity were sustained without any "active supervision" inquiry (and where a different result would likely obtain under the Second Circuit rule) and (2) directing the Court instead to decisions where *the applicability* of the "active supervision" prong was not in issue – and where (as in *Ticor*) the parties' only dispute concerned whether that standard was satisfied.

A. As the Petition explained, the Ninth Circuit's decision in *Charley's Taxi* (which the Opposition omits to discuss) expressly rejected the proposition that active supervision must be shown when a competitor challenges an exclusive designation – and the First and Seventh Circuits' decisions in

Arsberry and *Mass. Food Ass'n* (which Respondent also does not address) cogently explain the reasons why *rate* regulation – let alone "service" supervision – of an exclusive designee is not mandated by *antitrust* law. Indeed, *Charley's Taxi* reversed a district court decision that had denied immunity on grounds of failure to supervise service. *See* Pet.17.

1. The Sixth Circuit's decision in *Michigan Pay-Tel Joint Venture v. City of Detroit*, 287 F. 3d 527 (6th Cir. 2002), which Respondents *do* cite in passing (opp.12), is in square conflict with the Second Circuit's ruling. There, as here, the private party's exclusive designation (as sole provider of pay telephone service for prisons) was claimed to be part of a broader "pattern of unlawful and/or anti- competitive conduct calculated to attempt to monopolize the [local] pay telephone service market," *see* 287 F.3d at 535. Indeed, unlike here, the governmental defendant was charged with "knowingly facilitat[ing the private party's] anti-competitive conduct" and seeking to ensure its "monopolistic position in the pay telephone service market," *id.* These allegations, the Sixth Circuit explained, did not trigger the *Midcal* analysis, because the "effective decision" at the core of the case – the designation – was governmental in character, *id.* at 538.

2. These decisions are strongly reinforced by many other cases (cited at Pet. 13-15), in which exclusive governmental designations were held entitled to immunity, without any inquiry into either the designee's "quality of service" or the government's supervision thereof. As the Petition explains, any claim that these do not conflict with the Second Circuit's rule, depends on an unacceptable "formalism," *see Motor Carriers*, 471 U.S. at 57, *i.e.*, treating them as resting on plaintiffs' (presumed) failure to allege that the exclusively designated entity was providing "low quality service" – precisely the sort of "charge" that *every* disappointed rival can direct at every governmentally-designated competitor. *See Omni*, 499 U.S. at 375, 377 (noting that "[f]ew governmental actions are immune from the charge that they are 'not in the public interest'" and that an immunity

"exception" based on such claims could "swallow up the *Parker* rule").

Likewise, the necessary implication of the Second Circuit's rule is that the correctness of this Court's *Omni* decision depends on the absence of "poor service" allegations in that case. That would be an implausible account under any circumstances, and it is all the more so because there *were* other allegations in *Omni* – of "trade libel, the setting of artificially low rates, and inducement to breach of contract," 499 U.S. at 384 – but this Court refused to treat these sundry allegations of "private anticompetitive action[]," *id*, as bearing on the municipal defendant's (or even the private defendant's) *antitrust* immunity.

B. The decisions Respondent does cite provide no support for the free-floating duty of "active supervision" imposed by the Second Circuit. On the contrary, the private conduct requiring "supervision" in cases such as *Municipal Utilities Bd. v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994) and *Sandy River Nursing Care v. Aetna Casualty*, 985 F. 2d 1138 (1st Cir. 1993), are precisely the kind that (unlike *being a* monopolist, *see* Pet.App.35a, or providing "poor service") *would* – in the absence of authorization – plainly offend the Sherman Act, *see* 985 F.3d at 1146 (jointly proposed rates); *compare* 21 F.3d at 384 (agreement to allocate service territories) *with United States v. Topco Assocs.*, 405 U.S. 596 (1972).

Of course, if the cited decisions *did support* the Second Circuit – and thereby contradict the Sixth, Seventh, and Ninth Circuits – on the relevant legal point, that would be a further argument *in favor* of, not against, review by this Court. *Cf.* Pet.13 & n.11 (noting portions of decisions in *Englert v. McKeesport*, 637 F. Supp. 930 (W.D. Pa 1986) and *Southern Disposal, Inc. v. Texas Waste Mgm't*, 161 F.3d 1259 (10th Cir. 1998)), which could be read as supporting the Second Circuit's analysis).

III. The Second Circuit's Decision To Require The Village To Defend This Suit Warrants Review

The Brief in Opposition does not even mention, let alone defend the Second Circuit's further holding, *i.e.*, that the Village – whose only contested action (the exclusive delegation), has been held to *satisfy* the *Hallie* test -- should nonetheless be forced to defend the suit, on the ground that various of the Board's alleged bad acts were "pursuant to" the governmental designation and because, as the appeals court believed, the federalism concerns undergirding *Parker* immunity operate with less than full force when a political subdivision, rather than a State itself, is a defendant. In fact, the Opposition takes pains to emphasize that the only actions properly in issue are "private," Opp.12 , *i.e.*, ones that are "*clearly not those of*" the Village. Opp.3 (emphasis added).

For the array of reasons set out more fully in the Petition, this extraordinary ruling also warrants this Court's review and correction. First, even accepting that the Board's allegedly bad business behavior amounts to *anti-competitive* conduct within the reach of the *Sherman Act*, *but see* Pet.27, the further premise, that the Act imposes a species of vicarious liability on local governments, for "facilitating" independent violations by their designees, cannot be reconciled with either *Omni* or *Michigan Pay-tel*. Both those decisions sustained immunity, in the face of charges (and proof) of municipal involvement in private anti-competitive schemes of a character not even alleged here. Indeed, as just noted, the plaintiff in *Omni* sought to raise the very same sort of boilerplate unfair competition allegations that led the court below to fundamentally shift its analytical framework, but this Court, unlike the Second Circuit below, properly recognized these ancillary claims as essentially irrelevant to the immunity question.

Second, *Omni* – a case with a municipal defendant and one which highlighted the central importance of "fundamental principle[s] of federalism," 499 U.S. at 389, to *Parker* doctrine, stands against any sharp distinction between

the acts of "sovereigns" and those of local governments (acting under State authority), and as explained above, the prospect that liability will not be imposed or that relief will be limited to an injunction is cold comfort to a party entitled to *Parker* immunity.

Finally, the decision fails even to acknowledge the federalism costs of interposing antitrust courts in an arena – public safety – where local government responsibility has historically been greatest and where exclusive (government) provision, not open competition, is the historic norm. Indeed, unlike in product markets where the "public interest" and "customer satisfaction" are substantially coextensive, the "poor service" EII complains most loudly about – *e.g.*, "drive by inspections," where no real effort is made to look for defects needing repairs – are precisely the kind of "service" that many property owners, left to their own choice of providers, would opt for. *See Camara v. Municipal Court*, 387 U.S. 541, 552-53 (1967) (Clark, J., dissenting) (explaining that "[i]mmediate prospects for costly repairs" lead large percentages of homeowners to reject safety inspections at government expense). It is precisely because Village residents have an independent interest in thorough inspections (one that does not track individual property owners' cost-benefit analysis) that exclusive designations and (exclusive) municipal provision remain the norm.

Once it is recognized that the dispute here is, at bottom, one about how best to provide for the safety of those within Islandia's borders, the "presumption," *Hallie*, 471 U.S. at 45, that the Village's elected government – and not a federal antitrust court – is best suited to make decisions is sound as a matter of fact and decisive as a matter of law.

Conclusion

For the reasons set forth above and in the petition, certiorari should be granted in this case.

Respectfully submitted,

Donald T. Rave, Jr.
LAW OFFICES OF
DONALD T. RAVE
11 The Plaza
Locust Valley, N.Y. 11560
(516) 671-1295

David T. Goldberg
Counsel of Record
LAW OFFICE OF
DAVID T. GOLDBERG
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

Frank Ambrosino
REILLY, LIKE, TENETY &
AMBROSINO
179 East Neck Road
Babylon, N.Y. 11704
(631) 669-3000

Counsel for Petitioners

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